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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 735

JOHN H. LEIGHTON, JAMES A. McPHERSON, SUE P. LEIGHTON, ET AL., PETITIONERS,

*vs.*

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1933

CERTIORARI GRANTED APRIL 10, 1933

(37,432)

# (37,432)

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**OCTOBER TERM, 193**

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## NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Attorneys for Defendants and Appellants.

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In the District Court of the United States for the Northern District of California, Southern Division.

IN EQUITY—No. 2408-L.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

LEIGHTON & COMPANY, INCORPORATED, JOHN H. LEIGHTON, JAMES A. McPHERSON, SUE P. LEIGHTON, ELMER KENEZ, RALPH W. GROSMAN, ROBERT L. WYRICK, HERMAN WEINBERGER, HAROLD H. JENKINS, H. T. GREGG, WILLIAM KRUGER, JOSIE BERGERON, R. L. VOELKER, A. T. WALMSLEY, WILLIAM WERTH, M. N. JOHNSON, N. A. LARSEN, ANNIE McPHERSON,
Defendants.

## BILL OF COMPLAINT.

To the Honorable Judges of the District Court of the United States for the Northern District of California:

The complainant, the United States of America, by its attorney, George J. Hatfield, United States Attorney for the Northern District of California, complains of the defendants and respectfully shows to the court: [1*]

I.

That, at all times hereinafter mentioned, complainant was and now is a corporation sovereign and body politic.

II.

That, at all times hereinafter mentioned, the defendant, Leighton & Company, Incorporated, was and is a corporation duly organized under the laws of the State of California, having its principal office and place of business at San Francisco, in the State and Northern Judicial District of California, Southern Division of said District, within the jurisdiction of this Court.

III.

That the defendants John H. Leighton, James A. McPherson, Sue P. Leighton, Elmer Kenez, Ralph W. Grosman, Robert Wyrick, Herman Weinberger and Harold H. Jenkins, are citizens of the United States and of the State of California, and are inhabitants of and reside in the State and Northern Judicial District of California and in

*Page-number appearing at the foot of page of original certified Transcript of Record.

the Southern Division of said District, within the jurisdiction of this Court.

IV.

That H. T. Gregg, R. L. Voelker, A. T. Walmsley, M. N. Johnson, and H. A. Larsen, whose full Christian names complainant has, after diligent inquiry therefor, been unable to ascertain and who are sued herein by the initials by which they are respectively best known, William Kruger, Josie Bergeron, William Werth and Annie McPherson, are proper defendants, but, unless they voluntarily appear herein, may not be proceeded against in this action for that, as complainant is informed and believes and, upon such information and belief, avers, each of them resides without the [2] jurisdiction of and may not be served with the process of this Court and complainant has, after diligent endeavor therefor, been unable to ascertain the actual residence of them or either of them.

V.

That this is a suit in equity by the United States, of civil nature, arising under laws of the United States providing for internal revenue and the collection thereof.

VI.

That under the provisions of an Act of Congress, approved February 24, 1919, entitled "An Act to Provide Revenue and for other Purposes," which said Act is also known as the Revenue Act of 1918, it became and was the duty of said Leighton & Company, Incorporated, hereinafter referred to

as the company, to file with the Collector of Internal Revenue for the First District of California, a Corporation Income and Profits Tax Return, on Form 1120, for the calendar year ended December 31, 1918, showing a true and correct statement of the gains, profits and income received by or accrued to said company during the said calendar year and to compute thereon its income and profits tax under said Act, but said company wholly failed, neglected and refused to file such return.

That said company, by J. H. Leighton, its president, and James A. McPherson, its secretary, on or about June 12, 1919, in lieu of the proper and required return, filed with the Collector of Internal Revenue for the First District of California, a Partnership and Personal Service Corporation Income Tax Return, on Form 1065, for the said calendar year ended December 31, 1918, showing a net income of [3] $29,479.92, which said net income was subject to income and profits tax, but no tax was computed or paid or caused to be paid thereon by said company.

VII.

That said return so filed by said company as aforesaid was incorrect, misleading and false, in that it showed a net income for the said calendar year 1918 of $29,479.92 as the net income of a personal service corporation, and not subject to tax, whereas, in truth and in fact, said return should have shown for said calendar year a net income of $29,479.92 subject to corporation income and profits

taxes and total income and profits taxes due thereon of $12,455.40.

VIII.

That subsequent to the filing of said return, the Commissioner of Internal Revenue, upon information and facts submitted to him, directed a review and audit to be made of the income of said company for the said calendar year 1918 and, as a result thereof, he, the said Commissioner of Internal Revenue, determined that said company was not a personal service corporation as defined by Section 200 of the Revenue Act hereinbefore mentioned, and further determined that said company was entitled to have allowed, and he did allow, its application, which it had theretofore filed for the purpose, for assessment under the provisions of Section 327 and 328 of the said Act of Congress, and the deductions and taxes of said company, accordingly computed, upon the income, theretofore reported by it in said return, were determined by him to be as follows: [4]

1918.

| | | |
|---|---|---|
| Net Income returned, Bureau letter, dated May 16, 1923 | | $29,479.92 |
| Profits tax (Section 328) | | $10,406.60 |
| Net income | | $29,479.92 |
| Less: | | |
| Profits tax | $10,406.60 | |
| Exemption | 2,000.00 | 12,406.60 |

| | |
|---|---|
| Balance taxable at 12% | $17,073.32 |
| Tax at 12% | 2,048.80 |
| Total tax assessable | $12,455.40 |
| Tax previously assessed | None |
| Deficiency | $12,455.40 |

IX.

That under the provisions of an Act of Congress, approved February 24, 1929, entitled "An Act to Provide Revenue, and for Other Purposes," it became and was the duty of said company to file with the Collector of Internal Revenue for the First District of California a corporation Income and Profits Tax Return for the calendar year ended December 31, 1919, on Form 1120, showing a true and correct statement of the gains, profits and income received by or accrued to said company during the said calendar year ended December 31, 1919, and to compute thereon its income and profits taxes due under said Act, but said company wholly failed, neglected and refused to file said return on Form 1120.

That said company, by J. H. Leighton, its president, and James A. McPherson, its secretary, on or about March 13, 1920, in lieu of the proper and required return, filed with the Collector of Internal Revenue, for the First District of California, a Partnership and [5] Personal Service Corporation Return of income for the said calendar year 1919, on Form 1065, showing a net income of $41,595.93, which said net income was subject to income

and profits taxes, but no tax was computed or paid thereon by said company.

That said return as filed by said company as aforesaid was incorrect, misleading and false, in that it showed a net income for said calendar year 1919 of $41,595.93 as the net income of a personal service corporation, and not subject to tax, whereas in truth and in fact said return should have shown for said calendar year a net income of $41,595.93, subject to corporation income and profits tax and total income and profits taxes due thereon of $11,667.53.

*XI.*

That subsequent to the filing of said return, the Commissioner of Internal Revenue, upon information and facts submitted to him, directed a review and audit to be made of the income of said company for the said calendar year 1919 and, as a result thereof, he, the said Commissioner of Internal Revenue, determined that said company was not a personal service corporation as defined by Section 200 of the Revenue Act heretofore mentioned and further determined that said company was entitled to have allowed, and he did allow, its application, which it had theretofore filed for that purpose, for assessment under the provisions of Sections 327 and 328 of said Act of Congress, and the deductions and taxes of said company, accordingly computed, upon the income, theretofore reported by its said return, were determined by him to be as follows: [6]

1919.

| | | |
|---|---|---|
| Net income returned | | $41,595.83 |
| Profits Tax (Section 328) | | $ 8,564.41 |
| Net income | $41,595.83 | |
| Less: | | |
| Profits tax | $8,564.41 | |
| Exemption | 2,000.00 | 10,564.41 |
| Balance taxable at 12% | $31,031.42 | |
| Tax at 10% | | 3,103.14 |
| Total tax assessable | | $11,667.55 |
| Tax previously assessed | | None |
| Deficiency | | $11,667.55 |

XII.

That under the provisions of an Act of Congress, approved February 24, 1919, entitled "An Act to Provide Revenue, and for other Purposes," also known as the Revenue Act of 1918, it became and was the duty of said company to file with the Collector of Internal Revenue for the First District of California, a Corporation Income and Profits Tax Return for the calendar year ended December 31, 1920, on Form 1120, showing a true and correct statement of the gains, profits and income received by or accrued to said company during the said calendar year ended December 31, 1920, and to compute thereon its income and profits taxes due under said Act, but said company wholly failed, neglected and refused to file said return on Form 1120.

That said company, by J. H. Leighton, its president, and James A. McPherson, its secretary, on or about March 11, 1921, in lieu of the proper and required return, filed with the Collector of Internal Revenue, for the First District of California, a Partnership and [7] Personal Service Corporation Return of Income for the said calendar year 1920, on Form 1065, showing a net income of $35,848.72, which said net income was subject to income and profits taxes, but no tax was computed or paid thereon, by said company.

XIII.

That said return so filed by said company as aforesaid was incorrect, misleading and false, in that it showed a net income for the said calendar year 1920 of $35,848.72 as the net income of a personal service corporation, and not subject to tax, whereas, in truth and in fact, said return should have shown for said calendar year a net income of $35,848.72, subject to corporation income and profits taxes and total income and profits taxes due thereon of $9,259.21.

XIV.

That subsequent to the filing of said return, the Commissioner of Internal Revenue, upon information and facts submitted to him directed a review and audit to be made of the income of said company for the said calendar year 1920 and, as a result thereof, he, the said Commissioner of Internal Revenue, determined that said company was not a personal service corporation as defined by Section 200 of the Revenue Act hereinbefore men-

tioned and further determined that said company was entitled to have allowed, and he did allow, its application, which it had theretofore filed for that purpose, for assessment under the provisions of Section 327 and 328 of the Act of Congress, and the deductions and taxes of said company, accordingly computed, upon the income, theretofore reported by it in said return were determined by him to be as follows: [8]

1920.

| | | |
|---|---|---|
| Net income returned | | $35,848.72 |
| Profits tax (Section 328) | | $ 6,527.04 |
| Net income | $35,848.72 | |
| Less: | | |
| Profits tax | $6,527.04 | |
| Exemption | 2,000.00 | 8,527.04 |
| Amount taxable at 10% | $27,321.68 | |
| Tax at 10% | | $ 2,732.17 |
| Total tax assessable | | $ 9,259.21 |
| Tax previously assessed | | None |
| Deficiency | | $ 9,259.21 |

XV.

That said company, by James A. McPherson, its secretary, on or about February 27, 1924, duly executed, and filed with the Commissioner of Internal Revenue a certain instrument in writing entitled "Income and Profits Tax Waiver," whereby said

company extended for the period of one year the time within which the Commissioner of Internal Revenue might assess the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said company for the year 1918, which said instrument of writing was by the Commissioner of Internal Revenue duly approved and signed.

XVI.

That said company, by J. H. Leighton, its president, and James A. McPherson, its secretary, on or about March 13, 1925, duly executed and filed with the Commissioner of Internal Revenue a certain instrument in writing entitled "Income and Profits Tax Waiver (for [9] taxable years ended prior to March 1, 1921)," whereby said company waived the time prescribed by law for making any assessment of the amount of income, excess profits, or war-profits taxes due under any return made by or on behalf of said company for the year 1918 under existing revenue laws, or under prior revenue acts which said waiver, as provided therein, of the time for making any assessment, as aforesaid was to remain in effect until December 31, 1925, and then expire, except that if a notice of a deficiency in the tax should be sent to said company by registered mail before said date and no appeal should be taken therefrom with the United States Board of Tax Appeals, then said date to be extended sixty days, or if an appeal should be filed with said Board, then said date of mailing of said notice of deficiency and the date of final decision by said Board, which

said instrument of writing was by the Commissioner of Internal Revenue duly approved and signed.

XVII.

That said company, by J. H. Leighton, its president, and James A. McPherson, its secretary, on or about March 6, 1925, duly executed and filed with the Commissioner of Internal Revenue a certain instrument in writing entitled "Income and Profits Tax Waiver (for taxable years ended prior to March 1, 1921"), whereby said company waived the time prescribed by law for making any assessment of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said company for the year 1919 under existing revenue laws, or under prior Revenue Acts, which said waiver, as provided therein, of the time for making any assessment as aforesaid was to remain in effect until December 31, 1925, and then expire, except that if a notice of a deficiency in the tax should be sent to said [10] company by registered mail before said date and no appeal should be taken therefrom with the United States Board of Tax Appeals, then said date to be extended sixty days, or if an appeal should be filed with said Board, then said date to be extended by the number of days between the date of mailing said notice of deficiency and the date of final decision by said Board, which said instrument of writing was by the Commissioner of Internal Revenue duly approved and signed.

That, thereafter, on, to wit, August 4, 1925, the Commissioner of Internal Revenue, caused to be mailed to said company in care of its duly au-

thorized attorney, William Weinberger, 1237 Merchants Exchange Building, Los Angeles, California, a so-called thirty-day notice advising of the audit of the income tax returns of said company for the years 1918, 1919 and 1920, that the same disclosed a deficiency in the amount $33,382.16, and attaching thereto a statement exhibiting the detail of said audit and review for each of the said years as hereinbefore set forth. Said letter also advised said company that it was granted thirty days from the date thereof to present a protest against the determination of a deficiency as indicated by said audit.

XVIII.

That, thereafter, to wit, September 19, 1925, the Commissioner of Internal Revenue, within the time provided by said Income and Profits Tax Waivers, as filed by said company as aforesaid, and pursuant to the provisions of Section 274 of an Act of Congress approved June 2, 1924, entitled "An Act to Reduce and Equalize Taxation, to Provide Revenue and for Other Purposes," otherwise cited as the Revenue Act of 1924, by registered mail, notified said company of his determination of a deficiency in its income [11] tax returns for the years 1918, 1919 and 1920, amounting to $33,382.16 as shown in the aforesaid letter of August 4, 1925. Said notice also stated that said company was allowed sixty days from the date of mailing thereof within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of said determination.

XIX.

That said company did not file an appeal from the said determination of a deficiency for the said years 1918, 1919 and 1920, or for either of said years, as set forth by the Commissioner in the aforesaid notice, and thereafter, to wit, January 16, 1926, within the time provided by said "Income and Profits Tax Waiver" and within the time for making assessments as prescribed by Sections 277 and 278 of the aforesaid Revenue Act of 1924, the Commissioner of Internal Revenue, on the January 1926 list of income tax assessments, duly signed by the said Commissioner of Internal Revenue on said January 16, 1926, and by him on that day certified to the Collector for collections, assessed against the said company income and profits taxes as follows:

For the calendar year 1918, $12,455.40; for the calendar year 1919, $11,667.55; for the calendar year 1920, $9,259.21; that by reason of the income so received by said company during said calendar years 1918, 1919 and 1920, said company under the provisions of the Revenue Act aforesaid, became and now is indebted to complainant for income and profits taxes in the respective amounts, $12,455.40, $11,667.55 and $9,259.21, a total of $33,382.16, which said sum remains due and unpaid. [12]

XX.

That on or about February 23, 1921, the said company sold its business, franchise and property as a whole for the sum of $12,000.00 which said sum so received it distributed among its stockholders. That

the stockholders of the said company at the time of the said sale and distribution, the number of shares held by each of them and the amount received by each of them in such distribution are as follows, namely, the defendants herein:

| | | | |
|---|---|---|---|
| John H. Leighton McPherson | 1586 | shares | $ 6,344.00 |
| *(James A. ~~Leighton~~, | 222 | " | 888.00 |
| Sue P. Leighton, | 200 | " | 800.00 |
| Elmer Kenez, | 20 | " | 80.00 |
| Ralph W. Grosman, | 25 | " | 100.00 |
| Robert L. Wyrick, | 100 | " | 400.00 |
| Herman Weinberger | 30 | " | 120.00 |
| Harold H. Jenkins, | 50 | " | 200.00 |

and the following who are above named as proper defendants:

| | | | |
|---|---|---|---|
| H. T. Gregg, | 251 | " | 1,004.00 |
| William Kruger, | 299 | " | 1,196.00 |
| Josie Bergeron, | 35 | " | 140.00 |
| R. L. Voelker, | 17 | " | 68.00 |
| A. T. Walmsley, | 55 | " | 220.00 |
| Annie McPherson | 20 | " | 80.00 |
| William Werth | 25 | " | 100.00 |
| M. N. Johnson, | 45 | " | 180.00 |
| H. A. Larsen, | 20 | " | 80.00 |
| | 3000 | | $12,000.00 |

That by reason of the said sale of all its property and the distribution of all the proceeds thereof to its stockholders, as aforesaid, said company

*Awarded pursuant to court order at trial Aug. 13, 1931.

was and is left without money, assets or property of any kind with which to pay the said taxes due and owing to the United States, as hereinbefore specifically set forth, and the defendants and each of them received as stockholders of said company the money, assets and property of said company, as distributees, charged with a trust in favor of the United States to the extent of the taxes so due and unpaid. [13]

That, since said sale of its property and the distribution of the proceeds thereof, the said company has done and performed no corporate activities, but complainant is informed and believes, and, on such information and belief, avers, that it has not in fact surrendered its charter and its corporate existence has not in fact been dissolved, but, as complainant further avers, the said company does not now have and, since the date of the aforesaid distribution of the proceeds of sale of the said property has not had any money or other property of any kind whereon to levy or wherewith to satisfy or to pay in any part thereof a judgment which might be obtained against it.

XXI

That on, to wit, March 5, 1926, the Collector of Internal Revenue for the First District of California issued his warrant of distraint for the collection of the taxes then due and owing to the United States as hereinbefore set forth, by the said company in the amount $33,382.16, which said warrant was recalled March 26, 1926, without service thereof and on, to wit December 13, 1928, the said

Collector of Internal Revenue again issued his warrant of distraint for the collection of the said tax, but the same was returned unsatisfied by reason of the aforesaid sale of the property of the said company, the distribution of the proceeds thereof and for that the said company was thereby rendered wholly without money, property or assets of any kind wherewith to satisfy said tax or whereupon to make levy.

XXII.

That complainant has no clear, adequate and complete remedy at law against the said Leighton & Company, Incorporated, or either of the persons name as defendants herein, and therefore brings this suit. [14]

That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

Wherefore, in consideration of the premises and of the facts heretofore state, complainant, being without a clear, adequate and complete remedy at law, comes before the court and prays:

1. That this Honorable Court order, adjudge and decree that the aforesaid corporate assets so distributed to the defendants, the distributees as aforesaid, constitute a trust fund for the payment of the taxes due and owing by said company to the United States, and that the said defendants, the distributees as aforesaid, shall account to this court for the aforesaid trust property and that the fund aforesaid be applied to the payment of the taxes due and owing to complainant.

2. That this Honorable Court order, adjudge

and decree that the said defendants, the distributees as aforesaid, be accountable to complainant for the aforesaid taxes to the extent of the amount distributed to and received by them and each of them from the assets of said company, and that each of the said defendants, distributees as aforesaid, be ordered to pay to complainant to the extent of the amount distributed to and received by them from the assets of said company the amounts hereintofore shown to be due to complainant for income and profits taxes, together with interest at the legal rate from the dates when the aforesaid taxes become due.

3. That complainant have such other and further relief, general and special, as may appear to the court to be just and equitable as well as a decree for costs. [15]

And may it please the Court to grant unto said complainant a writ of subpoena of the United States of America issued out of and under the seal of this Honorable Court, directed to the above-named defendants, and commanding them on a day certain and under certain penalties therein expressed, personally to appear before this Honorable Court, then and there to answer all and singular the premises, and to stand to and perform and abide by such orders, directions and decrees as may be made against them in the premises, and complainant will ever pray, etc.

GEO. J. HATFIELD,
United States Attorney for the Northern District of California, Attorney for Complainant.

[Endorsed]: Filed Jul. 26, 1929. [16]

[Title of Court and Cause.]

AMENDED ANSWER.

Now come the defendants John H. Leighton, James A. McPherson, Sue P. Leighton, Ralph W. Crosman (sued herein as Ralph W. Grosman), Robert L. Wyrick and Herman Weinberger, above named, and for and as their amended answer to the bill of complaint on file herein, admit, deny and allege as follows, to wit:

I.

Admit the allegations set forth in Paragraph I of said bill of complaint. [17]

II.

Deny that at all times therein mentioned the defendant Leighton & Company, Incorporated, was and is, or was or is, a corporation duly organized under the laws of the State of California, having its principal office and place of business at San Francisco, in the State and Northern Judicial District of California, Southern Division of said District, within the jurisdiction of this court, or was at any time subsequent to June 30, 1929, or is, a corporation.

III.

Admit the allegations set forth in Paragraph IV of said bill of complaint, except that J. H. Leighton and Harold H. Jenkins (referred to in the bill of complaint as Jerald H. Jenkins) are inhabitants of and reside in the State of California and Northern

Judicial District of California, in the Southern Division of said District, within the jurisdiction of this court.

IV.

Admit the allegations set forth in Paragraph IV of said bill of complaint.

V.

Admit the allegations set forth in Paragraph V of said bill of complaint, except that defendants deny that any equitable jurisdiction is alleged in the bill.

VI.

Deny that under the provisions of an Act of Congress approved February 24, 1919, entitled "An Act to Provide Revenue and for other Purposes," which said Act is also known as the [18] Revenue Act of 1918, or under the provisions of any Act or Acts it became and was, or became or was, the or any duty of said Leighton & Company, Incorporated, to file with the Collector of Internal Revenue for the First District of California, or to file with any person or at all a Corporation Income and Profits Tax Return on Form 1120, or to file a Corporation Income and Profits Tax Return on any form other than form 1065 for the calendar year ended December 31, 1918, showing a true and correct, or true or correct, or any statement of the gains, profits and income, or of the or any gains or profits or income received by or accrued to said Company during the said calendar or any year. Deny that it became and was, or became or was, the or any duty of said Leighton & Company,

Incorporated, to compute thereon its income and profits tax under said Act, or to compute thereon any tax under any Act. Deny that said Company wholly or at all failed, neglected and refused, or failed or neglected or refused, to file an Income and Profits Tax Return for the calendar year ended December 31, 1918.

Deny that said Company, by J. H. Leighton, its President, and James A. McPherson, its Secretary, or by any person or persons or officer or officers, on or about June 12, 1919, or at any time, in lieu of the proper and required, or proper or required, or any return, filed with the Collector of Internal Revenue for the First District of California, or with any person, a Partnership and Personal Service Corporation Income Tax Return or Form 1065 for the said calendar year ended December 31, 1918, or for any year, and allege in this connection that the return so filed on Form 1065 was a true, correct and proper return. Deny that said Company at any time filed any Income Tax Return in lieu of the proper and required, or proper or required, return. Deny that said net Income of $29,479.92, or any income of said [19] Company, was subject to income and profits or any tax, except as provided in Section 218 of the Revenue Act of 1918.

VII.

Deny that said or any return so or at all filed by said Company was or is incorrect, misleading and false, or incorrect or misleading or false, in that it showed the net income for the said calendar year 1918 of $29,479.92 as the net income of a personal

service corporation and not subject to tax, or was or is incorrect or misleading or false in any manner or respect whatsoever or at all. Deny that in truth and in fact, or in truth or in fact, said or any return should have shown for said calendar or any year a net or any income of $29,479.92, or any sum or amount subject to corporation income and profits taxes or tax. Deny that the total corporation income or profits taxes or tax due thereon, or on any net income said company, was or is the sum of $12,455.40, or any sum or amount whatsoever or at all.

VIII.

Admit the allegations set forth in Paragraph VIII of said bill of complaint.

IX.

Deny that under the provisions of an Act of Congress approved February 24, 1929, entitled "An Act to Provide Revenue, and for other Purposes," or under the provisions or provision of any Act, it became and was, or became or was, the or any duty of said company to file with the Collector of Internal Revenue for the First District of California, or with any persons or person, a Corporation Income and Profits Tax Return for the calendar year ended December 31, 1919, or for any year, on Form 1120 or on any [20] form other than Form 1065.

Deny that said Company, by J. H. Leighton, its President, and James A. McPherson, its Secretary, or by any person or persons, or officers or officer, or at all, on or about March 13, 1920, or at any

time, in lieu of the proper and required, or proper or required, or any return filed with the Collector of Internal Revenue for the First District of California, or with any person, a Partnership and Personal Service Corporation Return of income for the said calendar year 1919, or for any year, on Form 1065. Alleges in this connection that the return so filed on Form 1065 was a true, correct and proper return. Deny that any Income and profits Tax Return filed by said Company showed a net income of $41,595.93, or any sum or amount which was or is subject to income and profits taxes, or any tax except as provided in Section 218 of the Revenue Act of 1918.

X.

Deny that said or any return as filed by said Company as aforesaid or at all was or is incorrect, misleading and false, or incorrect, misleading or false, in that it showed a net income for said calendar year 1919 of $41,595.93 as the net income of a personal service corporation and not subject to tax, or was or is incorrect or misleading or false in any manner or respect whatsoever or at all. Deny that in truth and in fact, or in truth or in fact, said or any return should have shown for said calendar or any year a net or any income of $41,595.93, or any sum or amount, subject to corporation income and profits tax. Deny that the total income and profits taxes or any tax due thereon, or on any return, was or is the sum of $11,667.53, or any sum or amount whatsoever or at all. [21]

XI.

Admit the allegations set forth in Paragraph XI of said bill of complaint.

XII.

Deny that under the provisions of an Act of Congress approved February 24, 1919, entitled "An Act to Provide Revenue, and for other Purposes," also known as the Revenue Act of 1918, or under the provisions or provision of any Act or Acts it became and was, or became or was or is, the or any duty of said company to file with the Collector of Internal Revenue for the First District of California, or to file with any person, a Corporation Income and Profits Tax Return for the calendar year ended December 31, 1920, or for any year, on Form 1120, or on any form save and except Form 1065, showing a true and correct, or true or correct, or any statement of the gains, profits and income, or any gains or profits or income received by or accrued to said company during the said calendar year ended December 31, 1920, or during any year whatsoever. Deny that it became and was, or became or was, or is, the or any duty of said company to compute thereon its income and profits taxes due under said or any Act.

Deny that said company, by J. H. Leighton, its President, and James A. McPherson, its Secretary, or by any person or persons, or officer or officers, or at all, on or about March 11, 1921, or at any time whatsoever, in lieu of the proper and required, or proper or required, or any return, filed with the Collector of Internal Revenue for the First District of

California, or with any person, a Partnership and Personal Service Corporation Return of income for the said calendar year 1920, or for any year, on Form 1065, or on any form, showing a net income of $35,848.72, or any sum or amount whatsoever. Deny that said net [22] or any income for said calendar year of said company was or is subject to income and profits taxes or any tax, except as provided in Section 218 of the Revenue Act of 1918.

XIII.

Deny that said or any return so or at all filed by said company was incorrect, misleading and false, or incorrect or misleading or false, in that it showed a net income for the said calendar year 1920 of $35,848.72, or of any sum, as the net income of a personal service corporation and not subject to tax, or was or is incorrect or misleading or false in any manner or respect whatsoever or at all. Deny that in truth and in fact, or in truth or in fact, said or any return should have shown for said calendar or any year a net income of $35,848.72, or of any sum or amount, subject to corporation income and profits taxes or any corporation income or profits tax. Deny that the total of any income and profits taxes or tax due thereon was or is the sum of $9,259.21, or any sum or amount whatsoever or at all.

XIV.

Admit the allegations set forth in Paragraph XIV of said bill of complaint.

XV.

Allege that these defendants have no information

or belief sufficient to enable them to answer the following allegations contained in Paragraph XV of said bill of complaint, to wit:

> "which said instrument of writing was by the Commissioner of Internal Revenue duly approved and signed,"

and basing their denial upon said ground, these defendants deny that said or any instrument of writing was by the Commissioner of [23] Internal Revenue duly or at all approved and signed, or approved or signed.

XVI.

Allege that these defendants have no information or belief sufficient to enable them to answer the following allegations contained in Paragraph XVI of said bill of complaint, to wit:

> "which said instrument of writing was by the Commissioner of Internal Revenue duly approved and signed,"

and basing their denial on said ground, these defendants deny that said or any instrument of writing was by the Commissioner of Internal Revenue duly or at all approved and signed, or approved or signed.

XVII.

Allege that these defendants have no information or belief sufficient to enable them to answer the following allegations contained in Paragraph XVII of said bill of complaint, to wit:

> "which said instrument of writing was by the Commissioner of Internal Revenue duly approved and signed,"

and basing their denial upon said ground these defendants deny that said or any instrument of writing was by the Commissioner of Internal Revenue duly or at all approved and signed, or approved or signed.

XVIII.

Admit the allegations contained in Paragraph XVIII of said bill of complaint. [24]

XIX.

Allege that these defendants have no information or belief sufficient to enable them to answer the following allegations contained in Paragraph XIX of said bill of complaint, to wit:

> "and thereafter, to-wit, January 16, 1926, within the time provided by said 'Income and Profits Tax Waiver' and within the time for making assessments as prescribed by Sections 277 and 278 of the aforesaid Revenue Act of 1924, the Commissioner of Internal Revenue, on the January 1926 list of income tax assessments, duly signed by the said Commissioner of Internal Revenue on said January 16, 1926, and by him on that day certified to the Collector for collections, assessed against the said company income and profits taxes as follows:
>
> "For the calendar year 1918, $12,455.40; for the calendar year 1919, $11,667.55; for the calendar year 1920, $9,259.21; that by reason of the income so received by said company during said calendar years 1918, 1919 and 1920, said company under the provisions of the Revenue

> Act aforesaid, became and now is indebted to complainant for income and profits taxes in the respective amounts, $12,455.40, $11,667.55 and $9,259.21, a total of $33,382.16, which said sum remains due and unpaid,"

and basing their denial on said ground these defendants deny that thereafter, to wit, January 16, 1926, or at any time within the time provided by said "Income and Profits Tax Waiver," and within the time for making assessments as prescribed by Sections 277 and 278, or by Section 277 or 278, or by any section of the aforesaid Revenue Act of 1924, or of any Act, the Commissioner of Internal Revenue, on the January, 1926, or any list of income tax assessments, duly or at all signed by the said or any Commissioner of Internal Revenue on said January 16, 1926, or on any day or date and/or by him or by any person on that or any date certified to the or any collector for collections, assessed against the said company, income and profits taxes or tax as follows, or at all; deny that the Commissioner of Internal Revenue assessed against the said company income and profits taxes or tax for the calendar year 1918, $12,455.40, or any sum or amount; or for the calendar [25] year 1919, $11,667.55, or any sum or amount; or for the calendar year 1920, $9,-259.21, or any sum or amount. Deny that by reason of the or any income so or at all received by said company during said calendar years 1918, 1919 and 1920, or said calendar or any year or years, of by reason of any matter or thing, said company, or these defendants or any of them, under the provi-

sions of the Revenue Act aforesaid, or under the provisions or provision of any Act, became and now is, or became or now is, indebted to complainant, or to any person, for income and profits taxes of tax, in the respective or any amounts or amount, or sums or sum, whatsoever or at all.

XX.

Deny that on or about February 23, 1921, or at any time the said company sold its business, franchise and property, as a whole or at all, or sold its business or franchise, for the sum of $12,000, of for any sum or amount or at all, except that said company sold its trade fixtures on or prior to said date for $12,000. Deny that the said or any taxes or tax was or is due and owing, or due or owing, to the United States. Deny that the defendants and each of them, or the defendants, or each or any of them, received, as stockholders of said company, or received at all, the or any money, assets and property, or money or assets or property, of said company, as distributees, or in any manner or at all, charged with a or any trust in favor of the United States, to the extent of the taxes so due and unpaid, or charged with a or any trust in favor of the United States, or in favor of any one to any extent whatsoever.

XXI.

Admit the allegations set forth in Paragraph XXI of said bill of complaint, and allege in this respect that said warrant [26] of distraint was never served upon nor was the tax therein mentioned ever demanded of the defendants above

named, or any of them or the said Leighton & Company, Incorporated.

XXII.

Deny that the complainant has no clear, adequate and complete, or clear or adequate or complete, remedy at law against the said Leighton & Company, Incorporated, or against either or any or all of the persons named as defendants herein.

XXIII.

Allege that these defendants have no information or belief sufficient to enable them to answer the following allegations contained in Paragraph XXIII of said bill of complaint, to wit:

"That the Commissioner of Internal Revenue authorizes and sanctions these proceedings,"

and basing their denial upon said ground deny that the Commissioner of Internal Revenue authorizes and sanctions, or authorizes or sanctions, these or any proceedings.

As and for a second, separate, distinct and affirmative defense to said suit, said defendants above named allege as follows, to wit:

I.

That pursuant to the Revenue Act of 1918, and on or about the 12th day of June, 1919, said Leighton & Company, Incorporated, one of the defendants herein, duly filed a return of its gross income, deductions and net income for the calendar year 1918; on or about the 13th day of March, 1920, said corporation duly filed a return of its gross income, deductions and net income [27] for the calendar year

1919; and on or about the 11th day of March, 1921, said corporation duly filed a return of its gross income, deductions and net income for the calendar year 1920, with the Collector of Internal Revenue for the First District of California, in the respective amounts as set forth in the bill of complaint on file herein, and that said returns were duly accepted by the said Collector of Internal Revenue as and for proper income tax returns under the Revenue Act of 1918, of said company for the said calendar years respectively; that upon each of said returns said company duly listed the names of its stockholders and the number of shares respectively held by each, and duly allocated thereon to each of its stockholders the proportionate shares of the net income of said company as shown by its several respective returns, and that thereafter, and in the manner and at the times required by the Revenue Act of 1918, the said stockholders so named duly paid a tax upon said income to said corporation, all as provided for in Section 219 of the Revenue Act of 1918.

II.

That the income of said company for each of the years 1918, 1919 and 1920, was derived from personal services rendered by the several stockholders of said company in conducting a dairy lunch in the City and County of San Francisco, State of California and that in the operation of said dairy lunch, and in the production of the net income of said company for each of said years, the capital employed therein was represented by counters, chairs, kitchen stoves and dishes, and said capital was not in any

of said years a material factor in the income of said company so earned as aforesaid, and that said company during each of said years, was a personal service corporation within the meaning of Section 200 and Section 218 of the Revenue Act of 1918. [28]

III.

That on or about the 23d day of February, 1921, and prior to any demands of the Commissioner of Internal Revenue with respect of additional taxes for the aforesaid years, said corporation duly sold and disposed of all of the aforesaid physical property used in the operation of said dairy lunch, at and for the price of $12,000.00, and thereafter and prior to the filing of the bill of complaint herein, duly distributed said $12,000.00 to its stockholders as their interests appeared at the time of said distribution.

IV.

That at no time did the Commissioner of Internal Revenue, or any other officer of the United States States, ever demand or require Leighton & Company, Incorporated, to file any other or further returns than the returns hereinbefore set forth, and the gross income, deductions and net income of said company for said years, as set forth upon said respective returns, was and is correct in every respect whatsoever, and the tax computed in said bill of complaint is based upon the returns so filed by said company for said years, and not otherwise.

V.

That thereafter, and on or about August 4, 1925, the then Commissioner of Internal Revenue mailed

to said company a so-called thirty-day letter advising it that said Commissioner intended to disallow to said company the status of a personal service corporation, as provided for in Section 218 of said Revenue Act of 1918, and subsequently thereto, and by letter bearing date September 19, 1925, said Commission proposed the assessment of taxes against said company at the graduated rate [29] provided for in said Act, and contrary to the right of said company to said personal service classification. That said Commissioner erroneously and contrary to law disallowed said personal service classification to said company, and said company at all times during each of the taxable years, 1918, 1919 and 1920, was a personal service corporation for the purposes and within the meaning of Sections 200 and 218 of the Revenue Act of 1918.

As and for a third, separate, distinct and affirmative defense to said suit, said defendants above named allege as follows, to wit:

I.

Said defendants by this reference here incorporate, as if here again set forth at length, Paragraphs I to V, inclusive, of their second, separate, distinct and affirmative defense hereinbefore set forth.

II.

That the taxes in this suit sought to be collected for each of the aforesaid taxable years, if assessed by Commissioner David H. Blair, were so assessed after his predecessors in office had by accepting the aforesaid returns so filed by said company, duly de-

termined from the facts therein set forth that said company was taxable under Section 218 of the Revenue Act of 1918, in conformity with the authority vested in said predecessor Commissioners under Section 250 (b) of the Act of 1918; that said factual determination was so made by the predecessors of said Commissioner David H. Blair after a disclosure of all the facts upon which said company claimed its right to personal service classifications under said Section 218. [30]

III.

That Commissioner David H. Blair was without authority to redetermine any tax or taxes for the calendar years 1918, 1919 and 1920, due or claimed to be due from said corporation after the said returns had been filed and duly accepted by his predecessors in office, and the factual determination duly made of the right of said company to personal service classification as hereinbefore alleged.

IV.

That said Revenue Act of 1918 was repealed coincidentally with the enactment of the Revenue Act of 1921, save and except as to accrued taxes; that no further or additional taxes, other than paid by the stockholders of said company as hereinbefore alleged, were, could or have accrued at the time of or after the repeal of the said Act, and said Commissioner David H. Blair had no authority under said Revenue Act, or any enactment of Congress, to impose other or further taxes upon said company.

As and for a fourth, separate, distinct and affirmative defense to said suit, said defendants above named allege as follows, to wit:

That this suit and the cause of action or proceeding set forth in the bill of complaint on file herein, is barred by the provisions of Section 250 (d) of the Revenue Act of 1918.

As and for a fifth, separate, distinct and affirmative defense to said suit, said defendants above named allege as follows, to wit:

That this suit and the cause of action or proceeding set forth in the bill of complaint on file herein, is barred by [31] the provisions of Section 250 (d) of the Revenue Act of 1921.

As and for a sixth, separate, distinct and affirmative defense to said suit, said defendants above named allege as follows, to wit:

That this suit and cause of action or proceeding is barred by the provisions of Sections 273, 277, 278, 279 and 280 of the Revenue Act of 1926.

As and for a seventh, separate, distinct and affirmative defense to said suit, said defendants above named alleged as follows, to wit:

That this suit and cause of action or proceeding is barred by the fact that no deficiency was ever assessed conformably with the provisions of Section 273 of the Revenue Act of 1926 against said defendants or any of them, and that this suit and cause of action or proceeding is not within the exceptions contained in Sections 273, 282 and 1001 or any of them of the Revenue Act of 1926, and upon the fur-

ther ground that no suit or proceeding may be initiated by the Commissioner of Internal Revenue against transferees, except in accordance with the provisions of Section 280 of the Revenue Act of 1926.

WHEREFORE, having fully answered, said defendants pray that they may be hence dismissed, together with their costs or suit herein incurred.

CHICKERING & GREGORY,
HERMAN WEINBERGER,
Solicitors for Said Appearing Defendants. [32]

State of California,
City and County of San Francisco,—ss.

Ralph W. Crosman, being first duly sworn, deposes and says that he is one of the appearing defendants in the above-entitled action (sued therein as Ralph W. Grosman); that he has read the above and foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein alleged on information and belief, and as to those matters he believes it to be true.

RALPH W. CROSMAN.

Subscribed and sworn to before me this 25th day of April, 1931.

[Notarial Seal] KATHRYN E. STONE.
Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within amended answer and receipt of a copy thereof is hereby admitted this 30 day of April, 1931.

GEO. J. HATFIELD,
Attorney for Complainant.

[Endorsed]: Filed Apr. 30, 1931. [33]

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[Title of Court and Cause.]

## STIPULATION AND ORDER REOPENING LEASE, ETC.

IT IS HEREBY STIPULATED by counsel for the respective parties as follows:

(1) That the above-entitled case shall be reopened and counsel for the appearing defendants agree to take the deposition of James A. McPherson for further examination on the 22d or 23d day of September, at a time to be agreed upon by the parties hereto.

(2) Conditioned upon the taking of such deposition it is stipulated that the amended answer of the appearing defendants, verified by the defendant Ralph Crosman, heretofore filed herein without an order of court, may deemed to have been filed as of the date of receipt thereof by the Clerk of the court.

(3) That the answer originally verified by the defendant Ralph Crosman may be deemed in evidence for the purpose of impeachment in so far as it may contain an admission or admissions of facts denied in the amended answer.

(4) That Paragraph XV, page 10 of said amended [34] answer is further amended by adding thereto that as of the date of the distribution of said sum of Twelve Thousand ($12,000.00) Dollars, John H. Leighton was the owner of 1,501 shares of the capital stock of said corporation and received the sum of Six Thousand and Four ($6,004.00) Dollars.

GEO. J. HATFIELD.
GEO. J. HATFIELD,
United States Attorney.
By ESTHER B. PHILLIPS.
By ESTHER B. PHILLIPS,
Asst. United States Attorney.
CHICKERING & GREGOREY,
HERMAN WEINBERGER,
Attorneys for Appearing Defendants.

SO ORDERED: Pursuant to the stipulation above, the submission of this case is set aside for taking of further testimony.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Sep. 22, 1931. [35]

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[Title of Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This suit came on regularly for trial upon the issues joined by the complaint on file herein and

the amended answer of the defendants John H. Leighton, James A. McPherson, Sue P. Leighton, Ralph W. Crosman, Robert L. Wyrick and Herman Weinberger on August 12, 1931, before the Honorable Harold Louderback, United States District Judge. The plaintiff appeared by Geo. J. Hatfield, United States Attorney, and Esther B. Phillips, Assistant United States Attorney; and the defendants named above appeared by Herman Weinberger and Messrs. Chickering and Gregory. Evidence, oral and documentary, was introduced, and the cause was argued and submitted. The Court having considered the facts and the law and having decided the case in favor of the plaintiff, now makes these

## FINDINGS OF FACT.

### I.

Leighton & Company was a corporation organized under the laws of California in 1917. On June 3, 1929, it failed to pay its corporate license tax to the State of California. It has never been dissolved by a court proceeding. [36]

### II.

Within the time required by law, said Leighton & Company, Inc., prepared and filed income tax returns for the years 1918, 1919, 1920. Said returns were not made fraudulently.

Said corporation entered into written waivers with the Commissioner of Internal Revenue by which the period for assessment against it of addi-

tional income taxes for the calendar years 1918 and 1919 was duly extended to March 3, 1926.

III.

On January 16, 1926, the Commissioner of Internal Revenue duly assessed against said corporation additional income taxes for the calendar year 1918 amounting to $12,455.40; for the calendar year 1919 in the amount of $11,667.53 and for the calendar year 1920 in the amount of $9,259.21. No part of the assessment was ever paid.

IV.

On February 23, 1921, said corporation sold its business, trade fixtures and all salable assets for the sum of $12,000.00 in cash, which was paid immediately. Shortly afterwards the corporation distributed the proceeds of the sale to its stockholders in proportion to their holdings, as follows:

| | | | |
|---|---|---|---|
| John H. Leighton, | 1501 | Shares | $6,004.00 |
| James A. MacPherson, | 222 | " | 888.00 |
| Sue I. Leighton, | 200 | " | 800.00 |
| Ralph W. Cresman, | 25 | " | 100.00 |
| Robert L. Wyrick, | 100 | " | 400.00 |
| Herman Weinberger, | 30 | " | 120.00 |
| Harold H. Jenkins, | 50 | " | 200.00 |
| H. T. Gregg, | 251 | " | 1,004.00 |
| Elmer Kenez, | 20 | " | 80.00 |
| William Kruger, | 299 | " | 1,196.00 |
| Josie Bergeron, | 35 | " | 140.00 |
| R. L. Voelker, | 17 | " | 68.00 |
| A. T. Walmsley, | 55 | " | 220.00 |
| Annie McPherson, | 20 | " | 80.00 |

| | | | |
|---|---|---|---|
| William Werth, | 25 | " | 100.00 |
| M. N. Johnson, | 45 | " | 180.00 |
| H. A. Larsen, | 20 | " | 80.00 |

[37]

V.

Following the sale, said corporation discontinued doing busines and has never re-engaged in business. Upon the distribution of the proceeds of the sale, the corporation was left without money, assets, or property of any kind with which to pay taxes to the United States, and since the sale has never acquired any property, money or assets on which levy might be made to satisfy said assessment or any judgment which might be obtained against it. Several attempts by the United States Collector of Internal Revenue to collect said taxes by distraint proceedings against said corporation were unsuccessful. No proceedings were ever begun against the stockholders to impose said taxes against them other than the present proceeding, and no judgment was ever obtained against the corporation.

VI.

This suit was authorized by the Commissioner of Internal Revenue.

From the foregoing facts the Court states these

## CONCLUSIONS OF LAW.

I.

That the corporate assets distributed to these defendants in the manner previously found by the court constituted a trust fund for the payment of said taxes owing by said company to the United

States and that said distributees are accountable to this court for said trust property so distributed to the extent distributed to each of them from the assets of said company, namely:

| | |
|---|---|
| John H. Leighton | $6,004.00 |
| James A. McPherson | 888.00 |
| Sue I. Leighton | 800.00 |
| Ralph W. Crosman | 100.00 |
| Robert L. Wyrick | 400.00 |
| Herman Weinberger | 120.00 |

[38]

together with interest thereon at 6% from January 16, 1926, said amounts to be applied to the payment of said taxes.

Let judgment be entered accordingly, with costs against each of these defendants, in the amount herein set after his or her name.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Jan. 9, 1932. [39]

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[Title of Court and Cause.]

## EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE PLAINTIFF HEREIN, AND PROPOSED AMENDMENTS AND REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE APPEARING DEFENDANTS HEREIN.

Now come the defendant stockholders, who have

appeared in the above-entitled suit and proceeding, and hereby except to the findings, and each of them, proposed by the plaintiff herein, and to the conclusions of law and each of them, proposed by the plaintiff herein, and request that the following special findings and conclusions or declarations of law be adopted in lieu, in place and in substitution therefor, as follows, to wit:

That in lieu of Finding No. I proposed by said plaintiff and excepted to by said defendants as aforesaid, said defendants request the adoption of the following finding:

I.

That Leighton & Company, Inc., was a corporation organized and existing under the laws of California from 1917 until after the commencement of this suit, and that on June 3, 1929, it failed to pay its corporate license tax to the State of California; that said Leighton & Company, Inc., has never been dissolved by a court proceeding. [40]

That said defendants request a further and new finding as follows, to wit:

II.

That within the time required by the Revenue Act of 1918, said Leighton & Company, Inc., prepared and filed federal tax returns for the calendar years 1918, 1919 and 1920, and that each of said returns contained the items of gross income, deductions and credits allowed by the Revenue Act of 1918; that said returns were not false or mislead-

ing; that except as said period for the assessment and/or collection of taxes under the Revenue Act of 1918 against said corporation was extended, as hereinafter in these findings set forth, the period for the assessment and/or collection of any such tax for the year 1918 expired March 15, 1924; for the year 1919 expired March 15, 1925; and for the year 1920 expired March 15, 1926.

That in lieu of Finding No. II proposed by said plaintiff and excepted to by said defendants as aforesaid, said defendants request the adoption of the following finding:

III.

That said corporation and the Commissioner of Internal Revenue executed in writing a written waiver by which the period for assessment against said corporation for additional taxes for the calendar years 1918 and 1919 was duly extended to March 3, 1926.

That in lieu of Finding No. VI proposed by said plaintiff and excepted to by said defendants as aforesaid, said defendants request the adoption of the following finding: [41]

IV.

That on February 23, 1921, said corporation sold its trade fixtures and physical property for the sum of $12,000 in cash, which was paid immediately, but retained the ownership of a leasehold in the property at 18 Turk Street, San Francisco, California, and also a chattel mortgage upon personal property situated in the loft of said premises; that

on or about February 23, 1921, said corporation distributed said sum of $12,000 to its stockholders in proportion to their holdings at said time as follows:

| | | | |
|---|---|---|---|
| John H. Leighton, | 1501 | Shares | $6,004.00 |
| James A. McPherson, | 222 | " | 888.00 |
| Sue I. Leighton, | 200 | " | 800.00 |
| Ralph W. Crosman, | 25 | " | 100.00 |
| Robert L. Wyrick, | 100 | " | 400.00 |
| Herman Weinberger, | 30 | " | 120.00 |
| Harold H. Jenkins, | 50 | " | 200.00 |
| H. T. Gregg, | 251 | " | 1,004.00 |
| Elmer Kenez, | 20 | " | 80.00 |
| William Kruger, | 299 | " | 1,196.00 |
| Josie Bergeron, | 35 | " | 140.00 |
| R. L. Voelker, | 17 | " | 68.00 |
| A. T. Walmsley, | 55 | " | 220.00 |
| Annie McPherson, | 20 | " | 80.00 |
| William Werth, | 25 | " | 100.00 |
| M. N. Johnson, | 45 | " | 180.00 |
| H. A. Larsen, | 20 | " | 80.00 |

That in lieu of Finding No. V proposed by said plaintiff and excepted to by said defendants as aforesaid, said defendants request the adoption of the following finding:

V.

That following the sale, said corporation discontinued doing business and has never re-engaged in business. That upon the distribution of the said sum of $12,000, the corporation was left without property, save and except said leasehold and said chattel mortgage, or money, with which to pay taxes to the United States, and since said sale has

never acquired any further property, money or assets on which levy may be made to satisfy said assessment or any judgment which might be collected or obtained [42] against it. That on December 13, 1928, a warrant of distraint was issued against said corporation but was returned unsatisfied by reason of the aforesaid sale of the property of said company and not otherwise, and said warrant was never served upon said corporation or any of its officers; that no proceedings of any kind were ever begun against any of the defendant stockholders herein to impose said taxes, or any thereof, upon or against them, other than the present proceeding, and no judgment was ever obtained against said corporation.

That in lieu of Finding No. VI proposed by said plaintiff and excepted to by said defendants as aforesaid, said defendants request the adoption of the following finding:

VI.

That this suit was authorized by the Commissioner of Internal Revenue against the stockholders of but not against said corporation.

That said defendants request a further and new finding as follows, to wit:

VII.

That in and by Section 280 of the Revenue Act of 1926, a clear, adequate, complete and speedy remedy at law is and was, at the time this suit was commenced, provided for the assessment and/or collection of any liability at law or in equity claimed to be due from the stockholders of said corporation,

or any of the defendants appearing in this suit, based upon the hereinbefore mentioned distribution of cash by said corporation, or otherwise, but that neither the Commissioner of Internal Revenue nor the plaintiff herein ever took or had any proceedings against the appearing defendants herein within the time or manner or as required by said Section 280 of the Revenue Act of 1926.

That said defendants request a further and new finding [43] as follows, to wit:

VIII.

That this suit against the appearing defendants herein was commenced after the expiration of the period of limitations for the assessment of said appearing defendants, as prescribed in Section 277 (a) (2) of the Revenue Act of 1924, and Sections 277 (a) (3), 280 and 1109 of the Revenue Act of 1926.

That said defendants request the adoption by this Court of the following declarations and/or conclusions of law:

I.

That the remedies at law of said plaintiff, as provided in and by Section 280 of the Revenue Act of 1926, were full, adequate and complete, and no ground for the intervention of equity jurisdiction is shown in or by the bill herein or under the evidence adduced at the trial hereof.

II.

That this suit and the recovery of any of said taxes against the appearing defendants herein is

barred by the provisions of Section 277 (a) (2) of the Revenue Act of 1924 and Sections 277 (a) (3), 280 and 1109 of the Revenue Act of 1926.

III.

That the plaintiff take nothing herein, and that judgment be entered for the appearing defendants, and each of them, herein.

That said appearing defendants further move the adoption by this Court of each of the special findings, declarations and/or conclusions of law hereinbefore set forth, and further move the Court that judgment be rendered for the appearing defendants [44] and against plaintiff.

Dated Dec. 5, 1931.

HERMAN WEINBERGER,
CHICKERING & GREGORY,
Attorneys for said Appearing Defendants.

Due service and receipt of a copy of the within is hereby admitted this 5 day of Dec., 1931.

GEO. J. HATFIELD.

Lodged Dec. 5, 1931. [45]

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In the Southern Division of the United States District Court for the Northern District of California.

EQUITY—No. 2408–L.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEIGHTON & COMPANY, INC., et al.,
Defendants.

## DECREE.

The above-entitled cause came regularly on for trial on August 12, 1931, the plaintiff being represented by Geo. J. Hatfield, United States Attorney, and Esther B. Phillips, Assistant United States Attorney, and the defendants John H. Leighton, James A. McPherson, Sue P. Leighton, Ralph W. Crosman, Robert L. Wyrick and Herman Weinberger appeared by Messrs. Chickering and Gregory and Herman Weinberger, and trial was thereupon had. Evidence oral and documentary was introduced, and the Court having made his findings of fact and conclusions of law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: That the corporate assets distributed to these defendants in the manner previously found by the Court constituted a trust fund for the payment of the taxes owing by said company to the United States and that said distributees are accountable to this Court for said trust property so distributed to the extent distributed to each of them from the assets of said company, namely: [46]

| | |
|---|---|
| John H. Leighton | $6,004.00 |
| James A. McPherson | 888.00 |
| Sue I. Leighton | 800.00 |
| Ralph W. Crosman | 100.00 |
| Robert L. Wyrick | 400.00 |
| Herman Weinberger | 120.00 |

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff do have and

recover against each of the above-named defendants, a principal sum with interest thereon at 6% from January 16, 1926, as follows:

John H. Leighton, principal $6,004.00, and accrued interest $2,131.42.

James A. McPherson, principal $888.00, and accrued interest $316.45.

Sue I. Leighton, principal $800.00, and accrued interest $284.35.

Ralph W. Crosman, $100.00 principal, and accrued interest $35.50.

Robert L. Wyrick $400.00 principal, and accrued interest $42.00.

Herman Weinberger $120.00 principal, and accrued interest $42.60.

Together with further interest at 6% per annum upon said principal sums until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that plaintiff do have and recover its costs herein.

HAROLD LOUDERBACK,
United States District Judge.

Endorsed]: Filed and entered Jan. 12, 1932. [47]

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[Title of Court and Cause.]

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

John H. Leighton, James A. McPherson, Sue P. Leighton, Herman Weinberger, R. W. Crosman and

Robert L. Wyrick, the above-named defendants and appellants, conceiving themselves aggrieved by the decree made and entered on the 1st day of January, 1932, in the above-entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they, and each of them, pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

HERMAN WEINBERGER,
CHICKERING & GREGORY,
Solicitors for Said Defendants and Appellants.

Appeal allowed upon giving cost bond in the sum of $250.00.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Feb. 4, 1932. [48]

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[Title of Court and Cause.]

ASSIGNMENT OF ERRORS ON APPEAL.

Now comes John H. Leighton, James A. McPherson, Sue P. Leighton, Herman Weinberger, Ralph W. Crosman and Robert L. Wyrick, defendants in the above-entitled cause, and file the following assignment of errors upon which they, and each of them, will rely in the prosecution of their appeal

petitioned for in said cause from the decree of this Court entered on the 12th day of January, 1932:

First: The Court erred in holding that it had jurisdiction to entertain said suit or to render a decree against said defendants, or any of them, in that all proceedings for the collection of corporate federal income taxes from transferees of corporations are, by the provisions of Section 280 of the Revenue Act of 1926, now wholly statutory, and such statutory remedy is speedy, adequate and complete.

Second: The Court erred in not holding that said cause or suit, as against said defendants, and each of them, is not barred by the fact that no notice of deficiency was ever mailed to or issued against said defendants, or any of them, and no other proceeding of any kind or character was ever commenced against the [49] said defendants conformably with the requirements of Sections 274, 280 and 283 of the Revenue Act of 1926.

Third: The Court erred in not holding that the issuance of a notice of deficiency against the said defendants herein conformably with the provisions of Sections 274, 280 and 283 of the Act of 1926, is a condition precedent to the initiation or the maintenance of any action, suit or proceeding of any kind or character against said defendants.

Fourth: The Court erred in not holding that it had no jurisdiction of said suit against said defendants, or any of them, by reason of the fact that no proceedings were commenced against the said defendants prior to the commencement of this suit

conformably with the requirements of said Section 280 of the Revenue Act of 1926.

Fifth: The Court erred in not holding that the remedy at law of plaintiff, as provided in Section 280 of the Revenue Act of 1926, is not full, adequate and complete, and that no ground for the intervention of equity jurisdiction is shown by the bill herein.

Sixth: The Court erred in holding that said suit is not barred as against the said defendants, and each of them, by the provisions of Section 250 (d) of the Revenue Act of 1918.

Seventh: The Court erred in holding that said suit is not barred as against said defendants, and each of them, by the provisions of Subdivision (b) (1) of Section 280 of the Revenue Act of 1926.

Eighth: The Court erred in not rendering judgment in favor of said defendants.

Ninth: The Court erred in allowing interest upon said judgment. [50]

WHEREFORE, defendants pray that the decree of said District Court may be corrected and reversed, and for such other and further relief as to the Court may seem just and proper.

CHICKERING & GREGORY,
HERMAN WEINBERGER,
Solicitors for said Defendants and Appellants.

Received a copy of the within assignment of errors this 5 day of February, 1932.

GEO. J. HATFIELD,
Atty. for Plff. and Appellee.

[Endorsed]: Filed Feb. 5, 1932. [51]

ROYAL INDEMNITY COMPANY,
Head Office: New York.

[Title of Court and Cause.]

COST BOND ON APPEAL.

WHEREAS, lately the District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said court between the above-named parties, a decree in equity was rendered against the said defendants and the defendants and appellants, John H. Leighton, James A. McPherson, Sue I. Leighton, Ralph W. Crosman, Robert L. Wyrick and Herman Weinberger have obtained from said court an order allowing an appeal to reverse the decree in the aforesaid suit,—

NOW, THEREFORE, in consideration of the premises and of such appeal, the Royal Indemnity Company does hereby undertake and promise in the sum of Two Hundred and Fifty and No/100 ($250.00) Dollars that the said appellants will pay all damages and costs if they fail to make their plea good, to which said Royal Indemnity Company acknowledges itself bound, and in case of a breach in any condition of this bond, the Court may upon notice to the surety of not less than ten (10) days proceed summarily in the above action and proceeding to ascertain the amount which the surety is bound to pay on account of such breach and render judgment [52] against it and award execution therefor.

Signed and dated at San Francisco, California, this 4th day of February, 1932.

ROYAL INDEMNITY COMPANY.

[Seal] By A. DOUGLAS MENNIE.

Attorney-in-fact.

The premium on this bond is $10.00 per annum.

State of California,

City and County of San Francisco,—ss.

On the 4th day of February, in the year one thousand nine hundred and ——, before me, John McCallan, a notary public, in and for said county, residing therein, duly commissioned and sworn, personally appeared A. Douglas Mennie, known to me to be the person whose name is subscribed to the within and annexed instrument, as the attorney-in-fact of the Royal Indemnity Company, and acknowledged to me that he subscribed the name of the Royal Indemnity Company thereto as surety and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in said county of San Francisco, the day and year last above written.

[Seal] JOHN McCALLAN,

Notary Public, in and for said County of San Francisco, State of California.

My commission expires April 12th 1933.

Form of bond and sufficiency of sureties approved.

HAROLD LOUDERBACK,

Judge.

[Endorsed]: Filed Feb. 5, 1932. [53]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Southern Division of the United States District Court for the Northern District of California:

You will please prepare and within thirty days from the issue of the citation on appeal of the above-entitled cause, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit duly authenticated copies of the following documents:

1. The complaint and the amended answer.
2. Stipulation reopening case, and to filing amended answer, and order of court thereon.
3. Findings of fact and conclusions of law.
4. Defendant's proposed amendments of findings of fact and conclusions of law.
5. Decree of the court.
6. Petition for and order allowing appeal, and fixing amount of cost bond.
7. Assignment of errors.
8. Cost bond. [54]
9. Praecipe for transcript of record.
10. Citation on appeal.
11. Clerk's certificate.

The foregoing to be prepared and duly authenticated, and transmitted in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 5th, 1932.

HERMAN WEINBERGER,
CHICKERING & GREGORY,
Solicitors for Defendants and Appellants.

Received a copy of the within praecipe this 5 day of February, 1932.

GEO. J. HATFIELD,
Atty. for Plff. and Appellee.

[Endorsed]: Filed Feb. 5, 1932. [55]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 55 pages, numbered from 1 to 55, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $8.75; that the said amount was paid by the defendant and appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 1st day of March, A. D. 1932.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [56]

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[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America, GREETING: To the United States of America, Appellee, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing appeal, filed in the Clerk's office of the above-entitled court, wherein John H. Leighton, James A. McPherson, Sue P. Leighton, Herman Weinberger, Ralph W. Crosman and Robert L. Wyrick are the appellants, and the United States of America is the appellee, to show cause, if any there be, why the decree referred to in such appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated February 5th, 1932.

HAROLD LOUDERBACK,
United States District Judge. [57]

Received a copy of the within citation this 5 day of February, 1932.

GEO. J. HATFIELD,
Atty. for Pltf. and Appellee.

[Endorsed]: Filed Feb. 5, 1932.

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[Endorsed]: No. 6766. United States Circuit Court of Appeals for the Ninth Circuit. John H. Leighton, James A. McPherson, Sue P. Leighton, Herman Weinberger, Ralph W. Crosman and Robert L. Wyrick, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 1, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6766

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

JOHN H. LEIGHTON, JAMES A. McPHERSON, SUE P. LEIGHTON, HERMAN WEINBERGER, RALPH W. CROSMAN and ROBERT L. WYRICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

**PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.**

At a stated term, to wit, the October Term A. D. 1931 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the 2nd day of June in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

## ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Herman Weinberger, counsel for the appellants, and by Miss Esther B. Phillips, Assistant United States Attorney, counsel for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the 3rd day of November in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in above entitled cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in said cause in accordance with the opinion filed.

[Title of Court and Cause.]

## OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Before: WILBUR and SAWTELLE, Circuit Judges, and NORCROSS, District Judge.

SAWTELLE, Circuit Judge:

This is an appeal from a decree rendered by the District Court in favor of the United States against the appellants. The appeal is heard upon the judgment roll.

Leighton & Company, Incorporated, was a California corporation engaged in business in San Francisco during the years 1918, 1919 and 1920, for which years it filed federal income and profits tax returns. The corporation claimed the right to be taxed as a "personal service corporation" under certain sections of the Revenue Act of 1918.

On February 21, 1921, the corporation disposed of its business and other assets for $12,000 in cash, and distributed the same to its stockholders, in proportion to their respective ownership of shares. This distribution left the corporation without means wherewith to pay taxes due to the appellee.

The Court found that the "corporation entered into written waivers with the Commissioner of Internal Revenue by which the period for assess-

ment against it of additional income taxes for the calendar years 1918 and 1919 was duly extended to March 3, 1926."

On January 16, 1926, the Commissioner of Internal Revenue assessed additional taxes against the corporation for the taxable years mentioned above, aggregating $33,382.14. Warrants of distraint were issued against the corporation and returned unsatisfied. The present suit in equity was filed by the United States on July 26, 1929.

The Court also found that "No proceedings were ever begun against the stockholders to impose said taxes against them other than the present proceeding, and no judgment was ever obtained against the corporation," and that "This suit was authorized by the Commissioner of Internal Revenue."

The Court's conclusion of law was as follows:

> "That the corporate assets distributed to these defendants in the manner previously found by the court constituted a trust fund for the payment of said taxes owing by said company to the United States and that said distributees are accountable to this court for said trust property so distributed to the extent distributed to each of them from the assets of said company, namely:

| | |
|---|---|
| John H. Leighton | $6,004.00 |
| James A. McPherson | 888.00 |
| Sue I. Leighton | 800.00 |
| Ralph W. Crosman | 100.00 |

| | |
|---|---|
| Robert L. Wyrick | 400.00 |
| Herman Weinberger | 120.00 |

together with interest thereon at 6% from January 16, 1926, said amounts to be applied to the payment of said taxes."

A decree was rendered accordingly.

The applicable provisions of the Revenue Act of February 26, 1926, and of the Revised Statutes are quoted at length:

"Sec. 274 (a). If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in sections 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such

assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

"Sec. 277 (a). Except as provided in section 278:

"(1) The amount of income taxes imposed by this act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * * *

"(3) The amount of income, excess-profits, and war-profits taxes imposed by the act entitled * * * Revenue Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"Section 278 (d). [26 USCA 1061]. Distraint or court proceeding; time for. Where the assessment of any income, excess-profits, or war-profits taxes imposed by this chapter or by prior Act of Congress has been made (whether before or after May 29, 1928) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after May

29, 1928), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

"Sec. 280 (a). The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *;

"(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax * * * imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax act.

* * * * * * * *

"Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

"(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

"(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

"(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this act.

"(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods,—then within one year after return of execution in such proceeding.

"(c) For the purposes of this section, if the taxpayer is deceased, or, in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

"(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in

respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

"(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this act."

"Sec. 1122 (b). The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions."

"R. S. 3213 (26 USCA 142). Suits for fines, penalties, and forfeitures, and taxes. It shall be the duty of the collectors, in their respective districts, subject to the provisions of this title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the

name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action."

The appellants' main contentions are that a compliance with the provisions of said Section 280 respecting the assessments of transferees of taxpayers is a condition precedent to the maintenance of a suit to enforce a tax liability against them as transferees; that the suit is barred by reason of the fact that no notice of deficiency was ever sent to the appellants respecting the tax due from the corporation or claimed to be due from them as transferees, as required by law; and that it is also barred by the statutes of limitations contained in the Revenue Acts of 1918 and 1926.

The appellants also contend that the Court was without jurisdiction to entertain the suit against the appellants as transferees, and that it erred in allowing interest on the decree.

The appellee concedes that the procedure provided by Section 280 of the Revenue Act of 1926 was not followed, but contends that the remedy provided by that section is cumulative and not exclusive, and that the procedure followed in the present case was proper.

A recent decision of the Supreme Court makes it plain that the remedy provided by Section 280 is not exclusive. In Phillips, et al. v. Commissioner, 238 U. S. 589, 593, Mr. Justice Brandeis, referring to that section, said:

> "This remedy is in addition to proceedings to enforce the tax lien or actions at law and in equity."

Again, at page 601, the learned justice observed:

> "The power of Congress to provide an additional remedy for the enforcement of existing liabilities is clear."

At page 592 of the opinion, the following language is found:

> "Stockholders who have received the assets of a dissolved corporation may confessedly be compelled, in an appropriate proceeding, to discharge unpaid corporate taxes. Compare Pierce v. United States, 255 U. S. 398. Before the enactment of § 280 (a) (1), such payment by the stockholders could be enforced *only* by bill in equity or action at law. Section 280 (a) (1) provides that the liability of the transferee

for such taxes may be enforced in the same manner as that of any delinquent taxpayer.

"The procedure prescribed for the collection of the tax from a stockholder is thus the same as that now followed when payment is sought directly from the corporate taxpayer." (Italics our own.)

In United States v. Updike, et al., 281 U. S. 489, the suit was brought to recover additional income and excess profits taxes from stockholders of the corporation more than seven years after the assessment. The theory upon which the suit was begun and prosecuted was that the assets of the corporation distributed to the stockholders, to the extent of the additional taxes, became trust funds received to the use of the United States. The sole question there considered was whether the suit, having been brought more than six years after the assessment, was barred by the provisions of Section 278 (a) and (d):

"(a) In the case * * * of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Section 278 (d) has already been set forth, supra.

In the Updike case, supra, as appears from the opinion of the Eighth Circuit Court of Appeals, which was affirmed by the Supreme Court, there was an assessment against the corporation, but none

against the transferees. 32 F. (2d) 1, 2, 5. Section 280 provides for the assessment of the liability of the transferee, and the appellants insist that such assessment was prerequisite to maintaining a suit of this character against them. Yet in the Updike case, supra, the Supreme Court based its decision against the government not upon the fact that the transferees had not been assessed, but upon the government's failure to bring suit within the prescribed time, under 278 (d).

From this it must follow that the Supreme Court, in the Updike case as well as in the Phillips case, did not regard Section 280 as exclusive, but cumulative; for though in the Updike case the provisions of Section 280 had not been complied with the Supreme Court did not regard such compliance as necessary to the government's right to bring suit, but decided that case on other grounds, involving another section of the act. Indeed, the Circuit Court of Appeals, whose decision was affirmed, at page 4 of its opinion, said:

> "Questions argued in the cross-appeal need not be discussed, except to say that the provisions of Section 280 (Act 1926; 26 USCA § 1069), providing for assessment against transferees, are cumulative, and do not bar this suit. Over and beyond distraint and statutory proceedings in court, there exists the plenary powers of courts of equity."

In United States v. Garfunkel, et al., 52 F. (2d) 727, 729, the Court observed:

> "The remedy of proceeding against the stockholder by way of assessment and distraint, made available by section 280 of the Revenue Act of 1926 . . . is an additional remedy."

See also, United States v. Greenfield Tap & Die Corporation, 27 F. (2d) 933.

Since the Supreme Court of the United States has held that Section 280 is not exclusive but cumulative, and that the six-year limitation runs from the date of assessment against the corporation, we must hold that the action herein is not barred, since it admittedly was filed but three and a half years after the assessment was made against the corporation. Furthermore, a reading of all the statutes quoted above leads one to the same conclusion; namely, that Section 280 was not intended to deprive the Court of its "plenary powers . . . of equity."

The right of the lower Court to allow interest is so fundamental as to render discussion unnecessary.

Decree affirmed.

[Endorsed]: Opinion. Filed November 3, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6766

JOHN H. LEIGHTON, JAMES A. McPHERSON, SUE P. LEIGHTON, HERMAN WEINBERGER, RALPH W. CROSMAN and ROBERT L. WYRICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered November 3, 1932. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of January in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellants, filed December 3, 1932, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Herman Weinberger, counsel for the appellants, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including February 20, 1933; and in the event the petition for a writ of certiorari to be made by the appellants herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated, San Francisco, California,
January 16, 1933.

[Endorsed]: Filed January 16, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-nine (79) pages, numbered from and including 1 to and including 79, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of January, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—Filed Feb. 10, 1933

Upon application of Mr. Herman Weinberger, counsel for the appellants, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is, stayed to and including March 1, 1933; and in the event the petition for a writ of certiorari to be made by the appellants herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Curtis D. Wilbur, United States Circuit Judge.

Dated San Francisco, California, February 10, 1933.

[File endorsement omitted.]

A true copy. Attest:

Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

February 10, 1933.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 10, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

# PETITION FOR A WRIT OF CERTIORARI

FILED
FEB 27 1933
CHARLES ELMORE CROPLEY
CLERK

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1932

No. 735

JOHN H. LEIGHTON, JAMES A. McPHERSON, SUE P. LEIGHTON, HERMAN WEINBERGER, RALPH W. CROSMAN and ROBERT L. WYRICK,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1932

No.

JOHN H. LEIGHTON, JAMES A. McPHERSON, SUE P. LEIGHTON, HERMAN WEINBERGER, RALPH W. CROSMAN and ROBERT L. WYRICK,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**
**to the United States Circuit Court of Appeals for the Ninth Circuit.**

*To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:*

Your petitioners, John H. Leighton, James A. McPherson, Sue P. Leighton, Herman Weinberger, Ralph W. Crosman and Robert L. Wyrick, respectfully apply to this Honorable Court to require by certiorari the above entitled cause to be certified to the Supreme Court of the United States for review and determination, and respectfully show:

That this is an appeal from a decision of the United States Circuit Court of Appeals for the Ninth Circuit in an equity proceeding in which the right of the government to enforce certain corporate income and profit taxes was upheld, petitioners being the transferees of certain of the assets of the corporation.

A complete statement of the facts in this case and a review of the legal principles involved will be found in the supporting brief which is attached hereto.

The Circuit Court of Appeals for the Ninth Circuit erred in each and every of the following particulars:

(a) The Court erred in failing and refusing to hold that a compliance with Section 280 of the Revenue Act of 1926 is a condition precedent to, and the exclusive remedy of, the government in the commencement or maintenance of any proceeding to enforce a liability against the transferee of a taxpayer.

(b) The Court erred in failing and refusing to hold that Section 280 of the Revenue Act of 1926 furnishes and constitutes an administrative and procedural step which must be taken for the

purpose of giving the transferee due notice by assessment of the institution of proceedings against said transferee.

(c) The Court erred in holding that the claim of the United States was not barred by the statute of limitations established by said Revenue Act of 1926.

(d) The Court erred in failing and refusing to hold that the remedy at law of the United States was plain, adequate and complete, and that there was ground for equitable jurisdiction here.

(e) The Court erred in allowing the United States to collect interest against petitioners from the date of the assessment against the corporation, whereas, in fact, interest should have been allowed only from the date of the filing of the complaint.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of all of the proceedings in this case numbered on the docket of said Court No. 6766, and that judgment therein may be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this

Honorable Court may seem meet and just, and your petitioners will ever pray.

Dated, San Francisco, California,
February 24, 1933.

WALTER C. FOX, JR.,
BLAIR S. SHUMAN,
HERMAN WEINBERGER,
*Attorneys for Petitioners.*

# In the Supreme Court
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*Petitioners,*

vs.

UNITED STATES OF AMERICA,

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**BRIEF IN SUPPORT OF**
**PETITION FOR WRIT OF CERTIORARI**
**to the United States Circuit Court of Appeals**
**for the Ninth Circuit.**

## I.

### STATEMENT OF THE CASE.

#### A. THE DECISIONS OF THE LOWER COURTS IN THE INSTANT CASE.

This is a proceeding to review the decision of the United States Circuit Court of Appeals for the Ninth Circuit found in 61 Fed. (2d) 530. Said decision affirms a decree of the United States District Court for the Northern District of California, Southern Division. The opinion of said District Court was not reported.

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#### B. THE FACTS.

Leighton & Company, Incorporated, a California corporation, was engaged in business in San Francisco, during the years 1918, 1919 and 1920. It filed its federal income and profits returns for said years within the times required by law, and by waivers, extended the time for the assessment of taxes against said corporation for the years 1918 and 1919 until March 3, 1926. The period of limitation for assessment of taxes for the year 1920 expired March 13, 1926. (R. 6, 39.) In said returns the corporation claimed the right to be taxed as a "personal service corporation" under Sections 200 and 218 of the Revenue Act of 1918. (R. 5, 21.) On February 23, 1921, the corporation sold its trade fixtures and physical property for $12,000 in cash. It retained a leasehold interest and chattel mortgage upon certain personal property. (R. 44.) There being no assessment then made, said cash so received from said sale was imme-

diately distributed to the several stockholders. It was left without means to pay taxes to the United States, never reengaged in business and never acquired assets subsequent to this distribution. This distribution, as well as the return, was made without fraudulent intent and in good faith.

On September 19, 1925, some five years after the cash had been distributed, the Commissioner of Internal Revenue determined that said corporation was not entitled to personal service classification and at that time proposed an additional assessment against it for said years 1918, 1919 and 1920. This assessment was finally made against the corporation on January 16, 1926. (R. 14, 40.) A warrant of distraint was issued against the corporation on March 5, 1926, which was recalled without service on March 26, 1926. It was again issued on December 13, 1928, and returned unsatisfied by reason, as alleged in the complaint, of the sale of the above mentioned personal properties. (R. 16, 17.) On July 26, 1929, some three and one-half years after said assessment was made against the corporation, this suit in equity was commenced upon the "trust fund theory" against the corporation and several of its stockholders. The summons was not served upon the corporation and no judgment was sought or obtained against it.

As found by the Court, no proceedings of any kind were ever instituted against petitioners to impose these taxes upon them other than by this suit. (R. 41.) The government left them in ignorance even of the fact that a claim was being made upon said defi-

ciency, until the filing of the complaint in equity in the present action.

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### C. THE APPLICABLE STATUTES.

The Revenue Act of 1926:

> "Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in sections 279, 282, or 1001,* no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

*The exceptions relate to waivers of restrictions upon the rights of the taxpayer herein given, the power to make jeopardy assessments subject to the right of appeal, special situations applicable to bankruptcies and receiverships, and the right of appellate review, which are not important to this discussion.

"Sec. 277 (a) Except as provided in section 278:

(1) The amount of income taxes imposed by this act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the act entitled * * * the Revenue Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *:

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax * * * imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax act.

* * * * * * *

(2) Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods,—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this act."

Section 1122 (b):

"The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions."

R. S. 3213 (Title 26 U. S. Code Ann. Sec. 142):

"Suits for fines, penalties, and forfeitures, and taxes. It shall be the duty of the collectors, in their respective districts, subject to the provisions of this title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, *where not otherwise provided for,* shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any district court of the United States," * * * (Italics ours.)

## II.

### GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Under Section 280 of the Revenue Act of 1926 the United States was given a sole and exclusive procedure. Prior to the enactment of that statute, any liability at law or in equity of a transferee of the assets of a corporation could only be enforced by a proceeding in court. This new act provides that any such liability *shall be assessed, collected and paid in precisely the same manner and subject to the same provisions* that govern the imposition of taxes on taxpayers. Where, as here, a return has been made, every proceeding against either a taxpayer or a transferee must be commenced by the Commissioner either by mailing a sixty-day notice of deficiency or making a jeopardy assessment, and in either event the person so addressed or assessed shall have the right of election to appeal to the Board of Tax Appeals or pay the tax and claim for refund. These specific requirements have been wholly ignored in this case. As a result, the petitioners have been deprived of their right to have the liability reviewed by the Board. This is a new and valuable right.

Even though Section 280 were not exclusive, nevertheless it *does* require that the transferee be given notice of the intended proceeding and a determination made by the Commissioner that the transferee is to be held liable for a tax. There was no notice of determination by the Commissioner, and no assessment of the transferee at any time here.

The last date on which the corporation could have been assessed was March 13, 1926. Under Section 280 an assessment of the transferees was barred one year thereafter—on March 13, 1927. This suit was, therefore, brought more than two years too late.

The present suit is one in equity. Equity had no jurisdiction here because there was a plain, speedy and complete remedy at law, and one adequate for the protection of both parties. This is to be found in the administrative and procedural provisions of Section 280, which incorporates those of Section 274.

Interest was allowed in the decree from January 16, 1926. This was the date of the assessment against the corporation. Interest should not have been allowed at any time prior to July 26, 1929, the date of the filing of the complaint. The transferees had no notice or knowledge of the claim of the government against them and, there having been no fraud in this case, it would be inequitable to permit interest to run against them until the suit had been filed. The federal rule is that interest is allowed in tax suits only when its imposition is fair and equitable.

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## III.

### SPECIFICATIONS OF ERROR.

In support of the matters which we have just set forth in our statement of the grounds on which the jurisdiction of this Court is invoked, we assign the

following errors which we believe to have been made by the Circuit Court of Appeals:

(a) The Court erred in failing and refusing to hold that a compliance with Section 280 of the Revenue Act of 1926 is a condition precedent to, and the exclusive remedy of, the government in the commencement or maintenance of any proceeding to enforce a liability against the transferee of a taxpayer.

(b) The Court erred in failing and refusing to hold that Section 280 of the Revenue Act of 1926 furnishes and constitutes an administrative and procedural step which must be taken for the purpose of giving the transferee due notice by assessment of the institution of proceedings against said transferee.

(c) The Court erred in holding that the claim of the United States was not barred by the statute of limitations established by said Revenue Act of 1926.

(d) The Court erred in failing and refusing to hold that the remedy at law of the United States was plain, adequate and complete and that there was ground for equitable jurisdiction here.

(e) The Court erred in allowing the United States to collect interest against petitioners from the date of the assessment against the corporation, whereas, in fact, interest should have been allowed only from the date of the filing of the complaint.

## IV.

## ARGUMENT.

### A. BY REASON OF THE EXCLUSIVENESS OF SECTION 280 OF THE REVENUE ACT OF 1926, A COMPLIANCE WITH THE PROVISIONS OF SAID SECTION IS A CONDITION PRECEDENT TO THE COMMENCEMENT OR THE MAINTENANCE OF ANY PROCEEDING TO ENFORCE A LIABILITY AGAINST A TRANSFEREE OF A TAXPAYER.

**(1) The history and purpose of Section 280 of the Revenue Act of 1926.**

In this case no attempt was made to enforce the liability of the petitioners as transferees in accordance with Section 280 of the Revenue Act of 1926. It is our contention that such a procedure is exclusive and that no collection may be made against a transferee in any action, either at law or in equity, without first having complied with it. The question has never been decided by this Court.

Section 280 declares that the liability at law or in equity of a transferee of the property of a taxpayer "*shall * * * be assessed,* collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency tax imposed by this title" * * *. The method referred to in Section 280 is, of course, that laid down in Section 274 having to do, first, with the determination of a deficiency, then the mailing to the taxpayer of a 60-day notice asserting the determination, and the right of the taxpayer to elect during said period whether he will appeal to the Board of Tax Appeals. The transferee, furthermore, has the protection given by the special statute of limitations in Section (b) of said Section 280.

The declarations of Congress at the time of the adoption of Section 280 and Section 316 of the Revenue Act of 1926 establish that the new procedure is exclusive. Until the adoption of that act the Commissioner was not required to resort to assessment in order to impose a tax liability. Under Section 278 (d) of the Revenue Act of 1924 he was permitted to bring suit in court without assessment if he was so minded, and, by a proposal to assess, he could bring the taxpayer to the Board of Tax Appeals as then constituted. Under the Act of 1924 the jurisdiction of the Board was, furthermore, very limited, and its decisions were subject to review in the District Court; whereas, under the Act of 1926, if a taxpayer elects to proceed before that body, a review may be had only in the Appellate Courts, although its findings of fact are conclusive.

The old provision allowing the Commissioner to proceed with or without assessment was *expressly omitted* from the Act of 1926. This was because experience under the 1924 Act had proved to Congress that a more orderly administration would result if the assessment procedure were made mandatory and exclusive. That Congress intended to bring this about is shown by Senate Finance Committee Report No. 52, January 22, 1926:

> "It is the purpose of the committee's amendment to provide for the enforcement of such liability to the government by the *new procedure* provided in the act for the enforcement of tax deficiencies." (Italics ours.)

And in Report of Conference Committee, No. 356, February 22, 1926, it was said:

> "In view of the above situation it will be seen that the amendment makes the procedure for the collection of the amount of liability of transferees conform to the procedure for the collection of taxes. The amendment thereby *substitutes* the specialized and more expeditious procedure of the board for that of the district courts in equity and will develop through the board a uniformity of precedents in lieu of the present rather vague principles of law governing the liability of a transferee for unpaid taxes of a transferor." (Italics ours.)

**(2) The cases interpreting the exclusiveness of Section 280.**

It is true that there are certain decisions of the Federal District Courts which expressly deny the exclusive character of Section 280. We believe, however, that they are wrongly decided in view of the express language of the 1926 Act and the declarations of Congress which we have heretofore quoted.

One of these is *United States v. Greenfield Tap & Die Corp.*, 27 Fed. (2d) 933. There a motion to dismiss a bill in equity upon the ground that the provisions of Section 280 were exclusive and mandatory was denied. It is assumed in the case that no assessment had ever been made against the transferee. The Court relied chiefly upon the effect of Section 3213 of the Revised Statutes, the effect of which we will consider later.

Another such case is *United States v. Garfunkel*, 52 Fed. (2d) 727, where a District Court denied a

motion to dismiss a bill in equity which showed on its face that an assessment had been made against the corporation, but that no steps had been taken under Section 280. The Court was of the opinion that said section was an additional remedy.

There are also certain cases which are frequently mentioned as having held that Section 280 is not exclusive but which, in our opinion, do not in any manner so hold. These are the various decisions in the *Updike* and *Phillips* cases.

Taking up the first decision in the *Updike* case—*United States v. Updike*, 25 Fed. (2d) 746. There the District Court had to do with a case arising from a tax imposed on a corporation for the year 1917. The corporation was forthwith dissolved and its assets distributed to its stockholders. An assessment of the corporation was made in 1920 and the suit against the transferees was instituted in 1927. The Court held under the six-year statute provided by the 1926 Act this proceeding was barred. An additional defense had been raised to the effect that the Court had no jurisdiction to entertain the case because the government was limited to proceeding under Section 280. This latter contention was overruled on the theory that Section 1122(b) clashed with, and controlled, the language as to exclusiveness contained in Section 280. We shall analyze Section 1122(b) later.

Both parties appealed in the *Updike* case and the decision of the Circuit Court is found in 32 Fed. (2d) 1. After analyzing the situation the Circuit Court upheld both decrees. It followed, without ques-

tion, the language of the decision as to the claim being barred by the statute of limitations. On the exclusiveness of Section 280 the Court felt it unnecessary to make a ruling, in view of the case having already been decided on the question of the statute of limitations, and it said:

> "Questions argued in the cross appeal need not be discussed, except to say" * * *

and then went on to give some reasons why Section 280 might not be exclusive. It finally said, however:

> "* * * but we need not consider here any question of the limitation of time for such assessment under 280, or the limitation of a proceeding in court after such assessment."

Both decrees were affirmed.

The final opinion in the *Updike* case was in this Court, in 281 U. S. 489. There apparently only one appeal was taken. This Court, after going into the case at considerable length, affirmed the decree upon the ground that the claim was barred by the statute of limitations. There is no language whatever with regard to the effect of Section 280, as to its being either exclusive or nonexclusive. At the conclusion of the case it is merely said:

> "This disposes of the case and it becomes unnecessary to determine whether the phrase 'at any time' imports a 'period of limitation', *or to consider other questions* presented in the argument." (Italics ours.)

It thus appears that the attitude of the tribunal in each of the decisions of the *Updike* case became pro-

gressively more favorable to our contention—the District Court held unequivocally that Section 280 is not exclusive; the Circuit Court held that it might not be exclusive, but that it would not decide the question; while this Court refused even to discuss it. Although the decision of this Court has sometimes been cited as establishing that the procedure under Section 280 is exclusive, we submit that it is not at all susceptible of this interpretation.

Another case which is in the same category is *Phillips v. Commissioner*, 42 Fed. (2d) 177, where the procedure laid down in Section 280 was followed in every respect and where the transferee elected, after receiving the notice of proposed assessment, to appeal to the Board of Tax Appeals. The question of the exclusiveness of Section 280 was, therefore, not before the Court. The only issues were the constitutionality of the act and the right of the government to collect the entire amount from a single stockholder. Both of these matters were answered in the affirmative and Judge Swan of the Circuit Court of Appeals for the Second Circuit said:

> "That which is paid results in the end in the collection of a tax, though from the transferee rather than from the person originally liable. It is a method of collecting revenue; and, though summary, it does not operate so harshly upon the transferee, in view of the recourse he may have to the courts to correct administrative errors, as to fall outside the pale of permissible legislation."

An appeal was taken to this Court, which will be found in 283 U. S. 589. There the judgment was

affirmed on both issues. In the opinion itself nothing is said with regard to the exclusiveness of the remedy under discussion. Such a reference was, of course, unnecessary. However, in a note on page 593, Mr. Justice Brandeis said:

> "This remedy is in addition to proceedings to enforce the tax lien or actions at law and in equity. Act of February 26, 1926, c. 27 § 1122 (b), 44 Stat. 9, 121; Act of May 29, 1928, c. 852 § 617(b), 45 Stat. 791, 877. Compare *United States v. Greenfield Tap & Die Corp.*, 27 Fed. (2d) 933; *United States v. Updike*, 25 Fed. (2d) 746, 747, affirmed, 32 Fed. (2d) 1, 4,281 U. S. 489."

In view of the fact that this note is not in any way essential to the decision, we respectfully urge that it does not bind this Court to follow its suggestion that the remedy is not exclusive, now that the question of exclusiveness is for the first time directly before the court. The only two cases cited in the note are the decisions of the district courts in the *Greenfield* case and the *Updike* case. One of these we have already shown to be erroneous and the other to have been abandoned as to the issue in question when it reached this Court.

Furthermore, our position has been upheld in the comparable situation of an estate tax. In *United States v. Cruikshank*, 48 Fed. (2d) 352, a sixty-day letter was issued to the executor of an estate and after the expiration of that period a suit was brought in court for the collection of the tax, no appeal having been taken by the executor. The trustee under the will,

as transferee of the assets of the estate, was also served with such a sixty-day letter, but only ten days were permitted to expire before the suit was commenced against said trustee. The Commissioner had, therefore, met the statutory requirement as to the executor but not as to the trustee. The Court said:

> "* * * The general proposition is beyond dispute that the United States may maintain a suit to collect unpaid revenue, unless another remedy has been expressly made exclusive. * * * It is also beyond dispute that, prior to the passage of the 1926 act, the United States had the right to institute suits at law or in equity to collect unpaid estate taxes at any time after they fell due, subject of course to any applicable statute of limitation. One may search the 1916 act * * * the 1918 act, the 1921 act, and the 1924 act, from beginning to end, without turning up any condition or restraint upon such right. In the 1926 act, however, there are certain restrictions upon the power to commence suits for the collection of estate taxes.[1] The important section in this connection is section 308(a) of 1926 act[2] * * *. Section 318(a) of 1926 act * * *, however, assimilates the procedure in collecting estate taxes under earlier acts to the procedure in the case of deficiencies under the 1926 act. And Section 316 * * * provides that the *liability of transferees * * * for estate tax under any act shall be assessed, collected, and paid in the same manner as indicated in the case of a deficiency under the 1926 act.* * * * In broadening the jurisdiction of the Board in 1926, Congress saw fit to provide that, until the executor had waived his right to

1. This is comparable to Section 280 of the income tax provision.
2. This is comparable to Section 274 (a) of the income tax provision.

lay the matter before the Board, the collection of the tax should be held in abeyance and there should be no assessment, distraint, or suit to collect the deficiency. * * *

As to the trustee, however, the Commissioner did not wait the required period. He commenced suit within ten days after the first notice of deficiency served upon the trustee. If this were a suit to establish liability against the trustee as a transferee of estate assets, I would be inclined to hold that section 316 (a) * * * read in connection with section 308 (a), was a bar to maintenance of a suit." (Italics ours.)

See, also:

*Snyder v. Marks*, 109 U. S. 189;
*United States v. Richards*, 27 Fed. (2d) 284;
*Ohio Steel Foundry Co. v. United States*, 38 Fed. (2d) 144, 146.

**(3) The opinion of the Circuit Court of Appeals in the present case.**

This decision goes off upon the theory that Section 280 is cumulative. Chief reliance is made on *Phillips v. Commissioner*, supra, wherein is the language in the footnote above referred to to the effect that the remedy is in addition to proceedings to enforce the tax lien, at law or in equity; and also language to the effect that the new procedure was intended to put the stockholder on the same basis as the corporate taxpayer. We respectfully submit that the latter indicates that the transferee is now in the same category as the taxpayers; before the government may proceed against either of them an assessment *must* be had

within the time provided by law against the person from whom the tax is sought.

The *Updike* case is also relied upon by the Circuit Court, but we have already analyzed the three opinions there and nothing is presented which we have not covered.

**(4) The effect of Section 3213 of the Revised Statutes.**

In those cases which hold that Section 280 is cumulative, Section 3213 of the Revised Statutes is often relied upon. This is a very old statute, to the general effect that collectors of internal revenue may bring suits for the collection of taxes and for fines and penalties in the proper district court of the United States. This is obviously a general statute. As such, it does not prevail over any specific provision contained in any subsequent one. Therefore, the specific provisions of Section 280—and, by reference, of 274—wholly control and override it. Tax statutes must be construed most favorably to the taxpayer and against the government. Furthermore, specific statutory provisions in regard to any particular subject prevail over the more general ones in the same or another statute.

See:

*Kepner v. United States,* 195 U. S. 100, at 125.

See, also:

*Ginsberg & Sons, Inc., v. Popkin,* 52 Sup. Ct. Rep. 322,

where this Court said:

* * * "General language of a statutory provision, although broad enough to include it, will not be

> held to apply to a matter specifically dealt with in another part of the same enactment * * *. *Specific terms prevail over the general in the same or another statute which otherwise might be controlling.*" (Italics ours.)

The effect of Section 3213 is, therefore, eliminated from this case.

**(5) The effect of Section 1122 (b) of the Revenue Act of 1926.**

Another statute relied upon in some of the opinions is Section 1122 (b). When read carefully this section is really an authority in support of our position. In skeleton form it is as follows:

> "The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders, etc., * * * as may be necessary or appropriate for the enforcement of the *provisions of this act.* The remedies *hereby* provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise *to enforce such provisions.*" (Italics ours.)

The important word in each sentence is "provisions". By this language, in each case, it is limited in its meaning simply to the provisions of the 1926 Act. Therefore, the first sentence limits the scope of the section to such an enforcement as shall be appropriate or necessary to enforce the provisions of the act and nothing else. In the second sentence the words "the remedies hereby provided" mean "provided by this section [1122 (b)]" rather than "the

remedies provided by the Act of 1926." Thus interpreted, the first sentence provides an aid to the enforcement of the act, and the second sentence says that such supplemental provisions as are mentioned in the *section* are in addition to any others which the United States may have to enforce the provisions of the act. Thus interpreted, the words "in addition to" and "not exclusive of" cannot mean that Section 280 is not the exclusive remedy against the transferee. The only recourse against transferees under the act is that contained in Section 280. Therefore, any remedy, either in court or otherwise, to enforce said section, as one of *the provisions* of the act, implies that Section 280 must be first rigidly followed and then it may be supplemented with the additional remedies of Section 1122 (b).

Such an interpretation is the only reasonable one. In fact, by a subsequent amendment, Congress has shown that it found the language too narrow. In 1928 this section was repealed by Section 617 of the 1928 Revenue Law. (U. S. C. A. 2701 (b).) The only change is the substitution of the words "internal revenue laws" for the words "the provisions of this act", and in the second sentence the words "such laws" for "such provisions". The Code says that the amendment widened the scope of the section. Obviously it was widened very much. Instead of being restricted to enforcement of the provisions of the act, it now covers any revenue law.

There has been no judicial interpretation of this amendment, but in *United States v. Murdock*, 284 U. S. 141, Sections 1122 (a) and (b) of the Revenue Act

of 1926 are referred to in a footnote as having been superseded by Section 617 of the Revenue Act of 1928. The government cannot claim that this amendment, having been made in 1928, approximately one year prior to the filing of complaint in this action and more than a year after the right to proceed under Section 280 had expired, could control the present suit. All of the rights of the parties have become established under the 1926 statute. If we are correct in our interpretation of the exclusive character of Section 280, by the time the 1928 amendment went into effect the government had lost, by passage of time, the right to proceed against the transferees. This right could not be revived by a subsequent statutory change in the power of the Internal Revenue Commissioner. At the time the Commissioner tacitly elected not to proceed under Section 280, Section 1122 (b) was still in its narrow scope and its phraseology at that time would cover the rights of the parties in this case. (*Russell v. United States,* 278 U. S. 181.)

Section 1122 (b) was enacted primarily to implement the Tax Act of 1926 by providing additional aid through court proceedings wherever necessary. That the section was not intended to eliminate the requirement of the Revised Statutes (R. S. § 3214) as to obtaining the authority of the Commissioner before a suit is filed either by a collector or by anyone else, is self evident. There is no such limitation of Section 1122 (b); hence if that section is given the force claimed for it by the government it means that it is no longer necessary for the Commissioner to sanction

proceedings in court. Such a result could never have been intended. All of this points to the conclusion that the purpose of the section was to provide incidental assistance in the collection of taxes, and that wherever judgments for taxes are sought, they must be obtained under the Revised Statutes, after the Commissioner has sanctioned the proceedings. Our interpretation is further fortified by the scope of the companion Section 1122 (a), which covers the powers of the government as to the production of documents in connection with tax suits.

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**B. EVEN IF SECTION 280 WERE NOT AN EXCLUSIVE REMEDY AGAINST TRANSFEREES, NEVERTHELESS THE ADMINISTRATIVE REQUIREMENTS PRESCRIBED BY THE REVENUE ACT OF 1926 AS TO ASSESSMENT ARE CONDITIONS PRECEDENT TO THE COMMENCEMENT OF A SUIT AGAINST THE TRANSFEREE.**

We believe that we have shown from the foregoing that the remedy provided by Section 280 is exclusive. If, however, this Court should decide this contention against us, nevertheless the administrative requirements of Section 280 are conditions precedent to the commencement of a suit against a taxpayer.

It is not unusual for Congress to impose conditions upon administrative officers. Statute 3214 has long provided that no suit for the recovery of taxes shall be commenced by the United States until the Commissioner of Internal Revenue authorizes the same. This does not affect the power of the United States to sue for the taxes. It merely means, as held in

*United States v. Tillinghast,* 55 Fed. (2d) 279, that the United States can resort to the courts only after certain administrative proceedings have been had, which Congress has declared are conditions precedent to the commencement of the suit. It centralizes authority in one individual for the sake of uniformity and to prevent unnecessary suits. Section 274 (a) is incorporated by reference in Section 280. Therefore, the Commissioner is required to comply with those conditions precedent before he may proceed against any transferee. This has nothing to do with the power of the United States to collect taxes either administratively or in court, *but rather is a pronouncement of the policy of Congress that transferees shall be notified* and afforded an opportunity to appear before the Board of Tax Appeals to contest the liability. This gives taxpayers and transferees that degree of due process of law always accorded any citizen. It consists of giving notice of the liability or charge against him and an opportunity to be heard before being subjected to judicial process. This precise point has never been passed upon, but the language of the Circuit Court of Appeals in *Phillips v. Commissioner,* 42 Fed. (2d) 177, at 179, intimates that such conditions precedent must be complied with. To the same general effect see *United States v. Cruikshank,* 48 Fed. (2d) 352.

The opinion of the Circuit Court in the instant case nullifies the specific requirement of the statute that notice be given whether Section 280 be exclusive or not. This right of a taxpayer to have his case reviewed by the Board of Tax Appeals in the

exercise of its administrative authority was held in *Russell v. United States,* 278 U. S. 181, to be "a new and valuable right", so that the Supreme Court has in effect held that on a proposition to assess by way of a sixty-day letter, the opportunity to appeal is more than a formality. In the *Phillips* case this new procedure was held sufficient to justify the exclusion of the jurisdiction of the district court. If all the jurisdiction of a district court may be thus excluded, that portion of it having to do with equity must fall with the rest.

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**C. THE CLAIM OF THE GOVERNMENT IS BARRED BY THE STATUTE OF LIMITATIONS.**

If we are right in our belief that Section 280 is exclusive and not cumulative, this claim must be barred by the statute of limitations contained in said section. The applicable portion thereof is as follows:

> "(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:
>
> (1) Within one year after the expiration of the period of limitation for assessment against the taxpayer;" * * *

In this case the assessment was made against the corporation on March 3, 1926, and the period within which assessment might be made of 1920 taxes (the last of the three tax years) expired on March 13, 1926. The complaint was not filed until July 26, 1929—some three and one-half years thereafter. If the government's rights under said section are not

cumulative the claim was barred on March 13, 1927. This is obvious and, in fact, is conceded by the government.

If this Court should disagree with our contention that the remedy prescribed by Section 280 is exclusive, but should hold that in any case it lays down the administrative requirement of notice to the transferee by the requirement of an assessment of such transferee, then too it is equally clear that the claim is barred by the same language of said section.

Finally, even if this Court should hold that Section 280 is neither exclusive nor carries with it the necessity of assessment after notice, nevertheless the claim is barred by limitation. The opinion of the Circuit Court disposes of the statute of limitations by saying that Section 280 is cumulative and that this Court held in *United States v. Updike,* 281 U. S. 489, that such a suit may be brought at any time within six years after an assessment was made against the corporation. But the only thing which was held in the *Updike* case was that where *more* than six years had expired between the assessment of the corporation and the filing of a suit against the stockholders, the claim was barred. This is not tantamount, however, to this Court holding that a lesser period would not, under proper circumstances, also constitute a bar. There the transferee was entitled, not only to the benefits of the specific limitations contained in Section 280, but also to that of any other provisions of the statute. Tax laws are not to be extended by inference adversely to a taxpayer or transferee. (*United*

*States v. Merriam,* 263 U. S. 179.) Since no assessment was made against the petitioners, as transferees, under Section 280, every limitation contained in the Act of 1926 and in the Act of 1928 expressly rules out the instant suit. Under Section 250 (d) of the Revenue Act of 1918 all proceedings for the assessment and collection of taxes must be commenced within five years after the return is filed. Under that limitation this suit was barred shortly after the enactment of the Act of 1926, except as to the limitation contained in subdivision (b) (1) of Section 280 of that act. Under Section 277 (a) (3) it is provided, so far as taxes accruing under the Revenue Act of 1918 are concerned, that they shall be assessed five years after the return is filed, and no proceeding in court without assessment shall be taken after the expiration of such period. Furthermore, under Section 278 no proceeding is authorized until the Commissioner has complied with the provisions of Section 274 (a).

The government has sought to avoid the effect of the specific statute of limitations contained in Section 280 by contending that an assessment against a corporation is sufficient to support a suit against the transferee. This in spite of the *Phillips* case to the effect that said section prescribes not only a remedy for the enforcement of the liability, but also defines "the extent of such liability" of the transferee. This would mean that an assessment against the transferee, within the time permitted by Subdivision (b) (1), that is, within one year after the

expiration of the period of limitation for the assessment of the transferor, would serve to restore the right of the Commissioner to proceed against a transferor. That an assessment of the transferor is unimportant provided the assessment against the transferee is made within time is held in *Baumgartner v. Commissioner,* 51 Fed. (2d) 472.

In a case like the present, where the government has permitted three and one-half years to go by after the assessment of the corporation, and long after it learned that the corporation was without assets, the unfairness of permitting the enforcement of a stale demand is obvious. (*United States v. Oregon Lumber Co.,* 260 U. S. 290.)

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**D. THE REMEDY AT LAW IS ADEQUATE AND THERE IS NO GROUND FOR EQUITABLE JURISDICTION IN THIS CASE.**

It is fundamental that no proceeding may be brought in equity if there is an adequate remedy at law. Section 267 of the Judicial Code expresses this universal rule:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

The remedy provided by Section 280 of the Revenue Act of 1926 itself furnishes such an adequate remedy. The summary administrative proceedings which it contemplates grant to the government a means of collecting the tax against the transferee which is in

all respects satisfactory. In *Phillips v. Commissioner,* 283 U. S. 589, the court said:

> "The proceeding is one to collect the revenue. That Congress deemed the section necessary in order to make the tax collecting system more effective, is established not only by the fact of enactment but also by the reports of the committees."

In the instant case a proceeding could have been started by making an assessment against the transferee. This would have been not only adequate but much more satisfactory for all parties than the present cumbersome equity suit. To say that equity has jurisdiction where the Commissioner fails to avail himself of his only adequate remedy, not only nullifies the intent of Section 267 of the Judicial Code, but is at variance with the decision in the *Phillips* case. It will be recalled that in the latter case the constitutionality of the tax and its fairness as to method of collection against transferees were upheld.

Our contention in this regard was wholly ignored by the Circuit Court of Appeals in its opinion. The government has cited a case as answering our contention, whereas when read carefully it upholds our position. This is *Hatch v. Morosco Holding Co.,* 50 Fed. (2d) 138. It is true that there the government succeeded by a creditor's bill on behalf of itself and other creditors in establishing its rights to the assets in a receiver's hands, the receiver being of the assets of the holding company which were first distributed by an operating company. The operating

company had incurred the original tax liability. However, in that case the government availed itself of just the very remedy at law upon the adequacy of which we here insist. A statement of facts contained in the opinion is as follows:

> "In 1925 additional income taxes were duly assessed against Morosco Theatre Company for the taxable years 1919 and 1920. These taxes remaining unpaid, in February, 1927, an assessment was made under section 280 of the Revenue Act of 1926 against Morosco Holding Company as a *'transferee'* of property of the Theatre Company. This *assessment,* in the sum of $36,668, is the basis for the claim filed by the United States." (Italics ours.)

Obviously, in that case the government did exactly what we say it should have done here.

*The only reason why the Commissioner did not proceed under Section 280 in this case is that said section prescribes a period of limitation which released the petitioners from liability.* Equity cannot, as equity, sustain a proceeding whose only merit is that an action at law cannot be maintained because the persons proceeded against are no longer liable to the imposition contemplated by Congress. In this case the Commissioner had his remedy for one year after the assessment against the corporation. For some reason he failed to avail himself of it. Surely he cannot now say that, having apparently elected by his inaction to waive his claim against the transferee, he has changed his mind and may now go into equity in order to get an adequate or any remedy. The defense of the

statute of limitations is not a technical one but is substantial and meritorious.

*United States v. Oregon Lumber Co.,* 260 U. S. 290.

Furthermore, the present case is not one where the trust fund theory is a proper remedy. Ordinarily, taxes are enforced either by administrative process or by action at law. Taxes are a sum certain, a debt readily determined and reduced to judgment under several forms of common law actions. If the government files a bill in equity against a taxpayer it will be immediately dismissed upon the ground that the remedy at law is adequate and complete. Equity intervenes only in unusual cases where actual or constructive fraud prevents the execution of a judgment. The "trust fund" proceeding is essentially one supplementary to execution. (*Swan Land & Cattle Co. v. Frank,* 148 U. S. 603, and *Pierce v. United States,* 255 U. S. 398.) The present suit does not attempt to subject a corporation transferor to a judgment. It is simply a suit to reach the transferees and subject them to a definite tax liability, a debt in a sum certain. If this were a proceeding to enforce the provisions of a judgment obtained against a corporation, as was the situation in *United States v. Frommel,* 50 Fed. (2d) 73, it would be one supplementary to tax execution. There would then be resort to equity to reach under such judgment assets claimed to be owned by the corporation in the hands of the stockholder.

This is not that type of proceeding at all. Here, the government has not reduced its claim to judgment

against the corporation. Although it joined the corporation as a defendant it did not even serve the corporation with process and no judgment was taken or asked against it. The only justification for equity jurisdiction in any tax matter is under the trust fund theory to reach property that could not be reached by a judgment at law. Here the subjects of the action are the stockholders as transferees and not the corporation.

We submit that upon the theory that Section 280 gave the government an adequate remedy at law against the petitioners as transferees (and the respondent concedes that it did not even seek to invoke such legal remedy, much less exhaust it), this action should have been dismissed under Section 267 of the Judicial Code.

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**E. INTEREST SHOULD HAVE BEEN CHARGED AGAINST PETITIONERS ONLY FROM THE DATE OF THE FILING OF THE COMPLAINT.**

The District Court allowed the plaintiff interest upon the amount claimed from January 16, 1926, (R. 50) although the complaint was not filed until July 26, 1929. In other words, the interest was allowed from the date of the assessment against the corporation. Before the Circuit Court we contended that no interest should be allowed until the date of the filing of the complaint. This claim was denied without anything more than cursory mention.

The allowance of interest is not fair to the defendants. It is true that in 1921 they received, in the distribution of the assets of the corporation, the property which ultimately was held to belong to the government; but the distribution was made honestly and without any intent to defraud, in a belief that the tax had been paid in full. Although certain steps were taken against the corporation as such, no proceedings were taken against the stockholders. There was not even a demand upon them prior to the institution of the present proceeding. It is, therefore, inequitable to require them to pay interest on an obligation which was not only unliquidated but, as far as they were concerned, was not known to exist. Nothing occurred in the meantime which could have lulled the government into believing that it could make collection against the corporation. It should not be entitled to receive interest against persons whose innocence is guaranteed by their ignorance of the existence of this claim.

Certain cases were cited by the United States Attorney before the Circuit Court in support of the proposition that in Federal courts interest may be allowed upon a suit for recovery of taxes, even in the absence of statute. This we concede to be the rule. But each of these cases contains the qualification that the imposition shall be made *only* when it does not work a hardship or lack of equity. The leading case in this connection is *Billings v. United States,* 232 U. S. 261. There the taxpayer had refused to pay a tax imposed upon foreign built yachts,

claiming it to be unconstitutional. The constitutionality of the statute was upheld and also the right of the government to collect interest, but the Court recognized that the particular facts existing there permitted the collection of the interest and that where it would be inequitable the same course would not be open to the government, saying (page 286):

> "Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment *where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. Young v. Godbe,* 15 Wall. 562, 565:
>
> 'It is said there is no law in the Territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages *for unreasonably withholding payment of an overdue account.* The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character.'
>
> And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice even though no express statute existed for compelling this payment." (Italics ours.)

In most of the cases which have relied upon the *Billings* case this qualification of the Federal rule has

been expressly recognized. In fact in *Nolte v. Hudson Navigation Company,* 8 Fed. (2d) 859, a decree allowing interest was modified so as to permit payment of the same only in case the condition of a bankrupt estate justified it. The Court recognized the rule established in the *Billings* case by saying:

> "In that case Chief Justice White said that in the courts of the United States, as distinguished from those of the states, the rule is 'interest in all cases where equitably due unless forbidden by statute.' "

In *Pierce v. United States,* 255 U. S. 398 the government obtained a judgment against a corporation based upon a fine. In the meantime the corporation transferred its assets to its stockholders and went out of business. A creditors bill was then brought by the government against the stockholders and judgment was entered against them, together with interest from the date of the indictment. This Court modified the decree on appeal, stating that interest should be allowed only from the date of the entry of the judgment against the stockholders themselves. In reaching this conclusion it was specifically held that no interest was allowable from the date of the indictment or even from the date of the entry of judgment against the corporation. This error was regarded as being so plain and so serious that the modification was granted even though the matter had not been raised in the Circuit Court of Appeals.

The facts of the present case make it inequitable for the government to ask for interest prior to the date of the filing of the complaint.

For each of the reasons herein in this brief set forth we urge that the petition for a writ of certiorari which is attached hereto be granted by this Court.

Dated, San Francisco, California,
February 24, 1933.

Respectfully submitted,
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